20-2-00543-21
AFS 83
Affidavit in Support
12413259

FILED
LEWIS COUN

2022 MAY 20 PM 1:40

SUPERIOR COURT
CLERK'S OFFICE

Honorable Judge James W. Lawler

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. FRANKLIN L. SMITH, Personal Representative of the ESTATE of LAURA HAMILTON, Defendants.	NO. 20-2-00543-21 DECLARATION OF R. PIERCE RAND IN SUPPORT OF DEFENDANT HAMILTON'S MOTIONS *IN LIMINE*

I, R. Pierce Rand, am over the age of 18 and competent to testify. I am one of the attorneys representing the Estate of Laura Hamilton in this matter and make this declaration based on personal knowledge and hereby declare as follows:

1. Attached as **Exhibit A** is a true and accurate copy of Defendant Hamilton's Answer to the Complaint in the *Myhre* lawsuit, dated March 26, 2014

2. Attached as **Exhibit B** is a true and accurate copy of Defendant Hamilton's Answer to the Complaint in the prior lawsuit before voluntary dismissal, dated June 12, 2017.

3. Attached as **Exhibit C** is a true and accurate copy of relevant pages from Defendant Hamilton's responses to Plaintiffs' initial discovery requests.

Johnson Graffe Keay
Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

4. Attached as **Exhibit D** is a true and accurate copy of relevant pages from the deposition transcript of defense midwife expert Dolly Browder, dated April 13, 2022.

5. Attached as **Exhibit E** is a true and accurate copy of relevant pages from the deposition transcript of Linda Amondson-Muller, dated May 2, 2022.

6. Attached as **Exhibit F** is a true and accurate copy of email correspondence with Plaintiffs' counsel regarding his questioning of defense witnesses about religion.

7. Attached as **Exhibit G** is a true and accurate copy of Dr. Freeman's deposition transcript, dated April 28, 2022.

8. Attached as **Exhibit H** is a true and accurate copy of the out-of-state decision in *Tucker v. Harrison*, 973 N.E.2d 46, 50-51 (2012), which is provided to the Court for convenience.

9. I have reviewed the transcripts of defense experts and could not locate any point where a defense expert testified that that traction cannot increase the risk of brachial plexus injuries in general. Rather, defense experts have opinioned, based on the specific facts and evidence in this case, that the injury to Z.H. was, more probably than not and to a reasonable degree of medical certainty, caused by the natural forces of labor.

10. Attached as **Exhibit I** is a true and accurate copy of Defendant Hamilton's Disclosure of Possible Fact and Expert Witnesses, and Disclosure of Possible Rebuttal/Alternate Witnesses.

11. Attached as **Exhibit J** is a true and accurate copy of Plaintiffs' Disclosure of Possible Fact and Expert Witnesses.

12. Attached as **Exhibit K** is a true and accurate copy of Defendant Hamilton's Motion for Partial Summary Judgment filed in the prior action, dated February 14, 2018. Plaintiffs did not oppose but instead voluntarily dismissed the parents' claims on March 27, 2018. The Order of Voluntarily Dismissal is also attached as **Exhibit K**.

Johnson Graffe Keay Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

13. Attached as **Exhibit L** is a true and accurate copy of this Court's Order on Defendant's motions *in limine* in the *Myhre* case, dated September 25, 2015.

14. Attached as **Exhibit M** is a true and accurate copy of relevant pages from the deposition transcript of Plaintiffs' OBGYN expert, Dr. Stohl, dated January 11, 2022.

15. Attached as **Exhibit N** is a true and accurate copy of relevant pages from the deposition transcript of Plaintiffs' OBGYN expert, Dr. Sollers, dated January 7, 2022.

16. Attached as **Exhibit O** is a true and accurate copy of relevant pages from the deposition transcript of Plaintiffs' sole midwife expert, Ms. Wilkinson, dated March 25, 2022.

17. Attached as **Exhibit P** is a true and accurate copy of medical records from Seng Hamilton's pregnancy of her youngest child in 2016, reflecting a diagnosis of gestational diabetes.

18. Attached as **Exhibit Q** is a true and accurate of copy of relevant pages from the deposition transcript of Defendant Hamilton's midwife expert, Ms. Burgess, dated April 29, 2022.

19. Attached as **Exhibit R** is a true and accurate copy of relevant pages from the deposition transcript of Plaintiffs' vocational expert, Cloie Johnson, dated March 11, 2022.

20. Attached as **Exhibit S** is a true and accurate copy of Stipulation to 21-Month Suspension signed by Seng Hamilton, filed July 28, 2017. Also attached as **Exhibit S** is the Amended Order approving the stipulation, dated July 27, 2017.

21. Attached as **Exhibit T** is a true and accurate copy of Plaintiffs' untimely Amended Disclosure of Possible Fact Expert and Rebuttal Witnesses, dated May 17, 2022.

22. Attached as **Exhibit U** is a true and accurate copy of email correspondence with Plaintiffs' counsel re: Ms. Smith and Ms. Ulmer.

Johnson Graffe Keay
Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

23. Attached as **Exhibit V** is a true and accurate copy of relevant pages from Laura Hamilton's deposition, dated June 27, 2019.

24. Attached as **Exhibit W** is a true and accurate copy of relevant pages from Dr. Allen's deposition transcript, dated April 5, 2022.

I declare under penalty of perjury that the foregoing is true and correct.

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

s/ R. Pierce Rand

R. Pierce Rand, WSBA#49736

Johnson Graffe Keay Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

CERTIFICATE OF SERVICE

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

Simeon J. Osborn, Esq., WSBA#14484
Susan Machler, Esq., WSBA#23256
Austin Neff, Esq., WSBA#57059
Osborn Machler
2025 First Avenue, Suite 1200
Seattle, WA 98121
Phone: (206) 441-4110
Fax: (206) 441-4220
sosborn@osbornmachler.com
smachler@osbornmachler.com
aneff@osbornmachler.com
Attorneys for Plaintiffs

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

Johnson Graffe Keay Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

Exhibit – A

Honorable Judge Mary Yu

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

LEVI ZANE MYHRE, a minor, by and through his Guardian ad Litem, WILLIAM L. E. DUSSAULT, Plaintiff, vs. LAURA HAMILTON, individually and her marital community; LAURA HAMILTON LICENSED MIDWIFE, a Washington business; JOINT UNDERWRITERS ASSOCIATION OF WASHINGTON STATE, a Washington business; JOHN AND JANE DOES 1 THROUGH 10; JOHN DOE CORPORATIONS 1 THROUGH 10; and OTHER JOHN DOE ENTITIES 1 THROUGH 10, all whose true names are presently unknown, Defendants.	No. 14-2-02446-1 SEA DEFENDANT LAURA A. HAMILTON'S ANSWER TO PLAINTIFF'S AMENDED COMPLAINT FOR DAMAGES

TO: PLAINTIFF ABOVE-NAMED

AND TO: RON PEREY and DOUG WEINMASTER
ATTORNEYS FOR PLAINTIFF

COMES NOW **Defendant Laura A. Hamilton** (hereinafter "Defendant"), by and through her attorneys of record, Donna M. Moniz and Johnson, Graffe, Keay,

JOHNSON, GRAFFE, KEAY, MONIZ & WICK, LLP
ATTORNEYS AT LAW
925 FOURTH AVENUE, SUITE 2300
SEATTLE, WASHINGTON 98104
PHONE (206) 223-4770
FACSIMILE (206) 386-7344

Moniz & Wick, LLP, and admits, denies and denies on information and belief Plaintiff's Complaint for Damages (hereinafter "Complaint"), as follows:

I. PARTIES

1.1 Defendant admits that Levi Zane Myhre is an almost 4-year-old boy who was born on April 4, 2010. Defendant further admits that he resides with his adoptive parents in Chehalis, Lewis County, Washington. Defendant is without sufficient knowledge or information to form a belief as to the truth about the remainder of paragraph 1.1 of Plaintiff's Complaint, and therefore denies the same.

1.2 Defendant admits that William L.E. Dussault is a lawyer who practices law in Seattle, Washington, and has been appointed as Guardian ad Litem for Levi Myhre for purposes of this lawsuit. Defendant is without sufficient knowledge or information to form a belief as to the truth about the remainder of paragraph 1.2 of Plaintiff's Complaint, and therefore denies the same.

1.3 Defendant admits that Laura Hamilton is a midwife who practices in Chehalis, Lewis County, Washington, under the name, "Laura Hamilton Licensed Midwife", a sole proprietorship. Defendant further admits that she managed the labor of Levi's mother and delivered Levi vaginally on April 4, 2010. Defendant denies the remainder of paragraph 1.3 of Plaintiff's Complaint.

1.4 Defendant is without sufficient knowledge or information to form a belief as to the truth about paragraph 1.4 of Plaintiff's Complaint, and therefore

JOHNSON, GRAFFE, KEAY, MONIZ & WICK, LLP
ATTORNEYS AT LAW
925 FOURTH AVENUE, SUITE 2300
SEATTLE, WASHINGTON 98104
PHONE (206) 223-4770
FACSIMILE (206) 386-7344

denies the same. Defendant specifically denies that JUA or its business affiliates are jointly and severally liable to plaintiffs.

1.5 Defendant admits that JUA by MSS provided Laura Hamilton with a Professional Liability Policy at times relevant to this lawsuit. Defendant is without sufficient knowledge or information to form a belief as to the truth about paragraph 1.5 of Plaintiff's Complaint, and therefore denies the same. Defendant specifically denies that MSS or its business affiliates are jointly and severally liable to plaintiffs.

II. JURISDICTION AND VENUE

2.1 Defendant admits Laura Hamilton delivered Levi Myhre in Lewis County. Defendant denies the remainder of paragraph 2.1 of Plaintiff's Amended Complaint.

2.2 Defendant admits that jurisdiction is proper under RCW 2.08.010. Defendant denies that venue is proper in King County. Defendant denies the remainder of paragraph 2.2 of Plaintiff's Complaint.

III. COMPLIANCE WITH LAWS PARTICULAR TO HEALTH CARE

3.1 No response is necessary to paragraph 3.1 of Plaintiff's Complaint.

IV. FACTS

4.1 Defendant admits paragraph 4.1 of Plaintiff's Complaint.

4.2 Defendant denies based on current information and belief.

4.3 Defendant denies paragraph 4.3 of Plaintiff's Complaint.

JOHNSON, GRAFFE, KEAY, MONIZ & WICK, LLP
ATTORNEYS AT LAW
925 FOURTH AVENUE, SUITE 2300
SEATTLE, WASHINGTON 98104
PHONE (206) 223-4770
FACSIMILE (206) 386-7344

4.4 Defendant admits that Levi had an operation at Children's Hospital on August 19, 2010, by Dr. Raymond Tse, for right brachial plexus palsy with Homer syndrome. Defendant admits that records reflect that this surgery included exploration and neurolysis of the brachial plexus, external neurolysis of the lower truck and C8 plus T1 roots, excision of neuroma with multiple cable nerve graft reconstruction using bilateral sural nerve grafts, direct transfer of C5 long thoracic nerve to C6 nerve root, and spinal accessory nerve to suprascapular nerve transfer. Defendant further admits that records reflect the findings at surgery included total brachial plexus palsy, C5 rupture, C6 rupture, C7 avulsion, C8 partial avulsion, and T1 partial avulsion. Defendant admits that Levi has gained some use of his arm since the surgery. Defendant is without sufficient knowledge or information to form a belief as to the truth about the remainder of paragraph 4.4 of Plaintiff's Complaint, and therefore denies the same.

4.5 Defendant is without sufficient knowledge or information to form a belief as to the truth about paragraph 4.5 of Plaintiff's Complaint, and therefore denies the same.

4.6 Defendant admits that at all times material hereto, defendant JUA insured Laura Hamilton. Defendant admits that law mandates that the JUA provide malpractice insurance coverage to any midwife licensed under chapter 18.50 RCW or midwife certified under chapter 18.79 RCW who applies for coverage unless the Washington State Insurance Commissioner specifically denies coverage for that midwife. Defendant denies the remainder of paragraph

JOHNSON, GRAFFE, KEAY, MONIZ & WICK, LLP
ATTORNEYS AT LAW
925 FOURTH AVENUE, SUITE 2300
SEATTLE, WASHINGTON 98104
PHONE (206) 223-4770
FACSIMILE (206) 386-7344

4.6 of Plaintiff's Complaint. Defendant denies the remainder of paragraph 4.6 of Plaintiff's Complaint.

4.7 Defendant admits that at all times material hereto, defendant JUA insured Laura Hamilton. Defendant denies the remainder of paragraph 4.7 of Plaintiff's Complaint.

V. NEGLIGENT CONDUCT OF DEFENDANTS

5.1 Defendant denies paragraph 5.1 of Plaintiff's Complaint.

5.2 Defendant denies paragraph 5.2 of Plaintiff's Complaint.

5.3 Defendant denies paragraph 5.3 of Plaintiff's Complaint.

5.4 Defendant denies paragraph 5.4 of Plaintiff's Complaint.

5.5 Defendant denies paragraph 5.5 of Plaintiff's Complaint.

5.6 Defendant denies paragraph 5.6 of Plaintiff's Complaint.

VI. LIABILITY

6.1 Defendant denies paragraph 6.1 of Plaintiff's Complaint.

6.2 Defendant denies paragraph 6.2 of Plaintiff's Complaint.

VII. DAMAGES

7.1 Defendant denies paragraph 7.1 of Plaintiff's Complaint.

7.2 Defendant denies paragraph 7.2 of Plaintiff's Complaint.

7.3 Defendant denies paragraph 7.3 of Plaintiff's Complaint.

VIII. PHYSICIAN-PATIENT PRIVILEGE

8.1 In answering paragraph VIII of the Complaint, Defendant acknowledges plaintiffs' statements regarding the physician/patient privilege but

JOHNSON, GRAFFE, KEAY, MONIZ & WICK, LLP
ATTORNEYS AT LAW
925 FOURTH AVENUE, SUITE 2300
SEATTLE, WASHINGTON 98104
PHONE (206) 223-4770
FACSIMILE (206) 386-7344

do not agree to be bound by plaintiffs' statements regarding the interpretation of the law.

8.2 In answering paragraph VIII of the Complaint, Defendant acknowledges plaintiffs' statements regarding the physician/patient privilege but do not agree to be bound by plaintiffs' statements regarding the interpretation of the law.

IX. ELECTION TO SUBMIT DISPUTE TO ARBITRATION

Defendant elects not to submit this dispute to voluntary arbitration.

AFFIRMATIVE DEFENSES

1. Joinder of the JUA and MSS in this action is not based on law or fact. It is an improper action in order to forum shop and attempt to put insurance information improperly before the jury by attempting to make the carrier liable substantively for the alleged tort of its insured.
2. The plaintiff has failed to state a claim upon which relief can be granted.
3. The proper venue of this action does not lie in King County, but rather in Lewis County.
4. If plaintiff has been damaged as alleged, such injury or damage was solely and proximately caused by an act of God.

JOHNSON, GRAFFE, KEAY, MONIZ & WICK, LLP
ATTORNEYS AT LAW
925 FOURTH AVENUE, SUITE 2300
SEATTLE, WASHINGTON 98104
PHONE (206) 223-4770
FACSIMILE (206) 386-7344

RESERVATION OF AFFIRMATIVE DEFENSES

Defendant Laura A. Hamilton expressly and specifically reserves the right to assert additional affirmative defenses following further discovery and investigation in compliance with the obligations set forth in CR 11.

PRAYER FOR RELIEF

WHEREFORE, Defendant, having fully answered Plaintiff's Complaint for Damages, demands judgment:

a. Dismissing Plaintiff's Complaint for Damages, with prejudice;

b. For costs; and

c. Such other relief as the court deems appropriate.

DATED this 26th day of March, 2014.

JOHNSON, GRAFFE, KEAY,
MONIZ &WICK, LLP

/s/ Donna M. Moniz, WSBA #12762
/s/ Karin J. Mitchell, WSBA #44101
Attorneys for Defendants
Laura A. Hamilton
925 Fourth Avenue, Suite 2300
Seattle, WA 98104
Telephone: (206) 223-4770
Fax: (206) 386-7344
donnam@jgkmw.com
mitchellk@jgkmw.com

CERTIFICATE OF SERVICE

I declare that on March 27, 2014, I filed this ***Answer to Plaintiff's Amended Complaint for Damages*** electronically with the Clerk of the Court using the Court's e-filing system. I also declare that I sent notice of this filing to the following parties of record in the manner described below:

Ron Perey, Esq, WSBA#2275
Doug Weinmaster, Esq., WSBA#28225
Perey Law Group, PLLC
1606 – 8th Avenue, North
Seattle, WA 98109
Phone: (206) 443-7600
Fax: (206) 443-4785
ronperey@pereylaw.com
dweinmaster@pereylaw.com
Attorneys for Plaintiff

Via E- and US Mail

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

EXECUTED this 27th of March, 2014, at Seattle, WA.

/s/ Bana Devi S. Vasquez
Assistant to Donna M. Moniz & Karin Mitchell

JOHNSON, GRAFFE, KEAY, MONIZ & WICK, LLP
ATTORNEYS AT LAW
925 FOURTH AVENUE, SUITE 2300
SEATTLE, WASHINGTON 98104
PHONE (206) 223-4770
FACSIMILE (206) 386-7344

Exhibit – B

pld 9

Rec'd & Filed
Lewis County Superior Court

JUN 12 2017

Lewis County Clerk

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

SCOTT AND SENG HAMILTON, individually and the marital community composed thereof, and SCOTT HAMILTON, as guardian ad litem for Zachary Hamilton, **Plaintiffs,** **vs.** **LAURA HAMILTON and JOHN DOE HAMILTON, individually and the marital community composed thereof; and LAURA HAMILTON LICENSED MIDWIFE, a Washington sole proprietorship,** **Defendants.**	**No. 17-2-00538-21** **DEFENDANT'S ANSWER TO PLAINTIFFS' COMPLAINT FOR PERSONAL INJURIES**

COMES NOW Defendant Laura Hamilton, LM (hereinafter "Defendant"), by and through her attorneys of record, Donna M. Moniz and Johnson, Graffe, Keay, Moniz & Wick, LLP, and admits, denies and denies on information and belief Plaintiffs' Complaint for Personal Injuries (hereinafter "Complaint"), as follows:

///

///

COPY

JOHNSON, GRAFFE, KEAY,
MONIZ & WICK, LLP
ATTORNEYS AT LAW
925 FOURTH AVENUE, SUITE 2300
SEATTLE, WASHINGTON 98104
PHONE (206) 223-4770
FACSIMILE (206) 386-7344

I. PARTIES

1.1 Defendant admits paragraph 1.1 of Plaintiffs' Complaint.

1.2 Defendant is without sufficient knowledge or information to form a belief as to the truth about paragraph 1.2 of Plaintiffs' Complaint, and therefore denies the same.

1.3 Defendant admits that she is a midwife who practices in Lewis County, Washington, that she has a Washington State Department of Health Midwife License, Credential No. MW00000041, and that she operates a business providing midwifery services to clients. Defendant denies the remainder of paragraph 1.3 of Plaintiffs' Complaint.

1.4 Defendant admits paragraph 1.4 of Plaintiffs' Complaint.

II. JURISDICTION AND VENUE

2.1 Defendant admits that jurisdiction and venue are proper, but denies any acts or omissions giving rise to causing an action.

2.2 Defendant admits paragraph 2.2 of Plaintiffs' Complaint.

III. FACTS

3.1 Defendant admits that Seng Hamilton was a patient of Defendant's throughout her pregnancy with Zachary Hamilton, and that she saw Ms. Hamilton every month from October 2013 to April 2014. Defendant further admits that Zachary Hamilton was born on April 9, 2014. Defendant denies the remainder of paragraph 3.1 of Plaintiffs' Complaint.

3.2 Defendant admits that she went to Seng Hamilton's house for the

JOHNSON, GRAFFE, KEAY, MONIZ & WICK, LLP
ATTORNEYS AT LAW
925 FOURTH AVENUE, SUITE 2300
SEATTLE, WASHINGTON 98104
PHONE (206) 223-4770
FACSIMILE (206) 386-7344

delivery of Zachary Hamilton, and that her labor was not a long labor – maybe 4-6 hours of active labor. Defendant denies the remainder of paragraph 3.2 of Plaintiffs' Complaint.

3.3 Defendant admits that Defendant noted a brachial plexus injury at birth and contacted a pediatrician shortly after the birth. Defendant denies the remainder of paragraph 3.3 of Plaintiffs' Complaint.

3.4 Defendant denies paragraph 3.4 of Plaintiffs' Complaint.

IV. NEGLIGENCE AND LIABILITY

4.1 Defendant admits that Defendant owed the standard of care of a reasonably prudent midwife to plaintiffs. Defendant denies the remainder of paragraph 4.1 of Plaintiffs' Complaint.

4.2 Defendant denies paragraph 4.2 of Plaintiffs' Complaint.

4.3 Defendant denies paragraph 4.3 of Plaintiffs' Complaint.

4.4 Defendant denies paragraph 4.4 of Plaintiffs' Complaint.

4.5 Defendant denies any omissions on the part of Defendant Laura Hamilton. Defendant denies any separate business which would have potential vicarious liability. Defendant denies the remainder of paragraph 4.5 of Plaintiffs' Complaint.

4.6 Defendant denies paragraph 4.6 of Plaintiffs' Complaint.

V. DAMAGES

5.1 Defendant denies paragraph 5.1 of Plaintiffs' Complaint.

5.2 Defendant denies paragraph 5.2 of Plaintiffs' Complaint.

JOHNSON, GRAFFE, KEAY, MONIZ & WICK, LLP
ATTORNEYS AT LAW
925 FOURTH AVENUE, SUITE 2300
SEATTLE, WASHINGTON 98104
PHONE (206) 223-4770
FACSIMILE (206) 386-7344

5.3 Defendant denies paragraph 5.3 of Plaintiffs' Complaint.

VI. PRAYER FOR RELIEF

Defendant denies section VI (a-e) of Plaintiffs' Complaint.

AFFIRMATIVE DEFENSES

1. Plaintiff Scott Hamilton's claims are barred due to the running of the applicable statute of limitations.

2. Plaintiff Seng Hamilton's claims are barred due to the running of the applicable statute of limitations.

3. Plaintiff Zachary Hamilton's injury was caused by an act of God - the natural forces of labor.

RESERVATION OF AFFIRMATIVE DEFENSES

Defendant Laura Hamilton, LM expressly and specifically reserves the right to assert affirmative defenses following further discovery and investigation in compliance with the obligations set forth in CR 11.

WHEREFORE, Defendant, having fully answered Plaintiffs' Complaint for Personal Injuries, demands judgment:

a. Dismissing Plaintiffs' Complaint for Personal Injuries, with prejudice;

b. For costs; and

JOHNSON, GRAFFE, KEAY, MONIZ & WICK, LLP
ATTORNEYS AT LAW
925 FOURTH AVENUE, SUITE 2300
SEATTLE, WASHINGTON 98104
PHONE (206) 223-4770
FACSIMILE (206) 386-7344

c. Such other relief as the court deems appropriate.

DATED this 6 day of June, 2017.

JOHNSON, GRAFFE, KEAY,
MONIZ &WICK, LLP

Donna M. Moniz
WSBA #12762
Attorneys for Defendant
Laura A. Hamilton, LM
925 Fourth Avenue, Suite 2300
Seattle, WA 98104
Telephone: (206) 223-4770
Fax: (206) 386-7344
donnam@jgkmw.com

I certify under penalty of perjury under the laws of the State of Washington that I served on all counsel of record a copy of the document to which this certificate is affixed, via:
__E-service __Facsimile
__Messenger X U.S. Mail
Signed at Seattle, Washington
on 6-6-17

JOHNSON, GRAFFE, KEAY,
MONIZ & WICK, LLP
ATTORNEYS AT LAW
925 FOURTH AVENUE, SUITE 2300
SEATTLE, WASHINGTON 98104
PHONE (206) 223-4770
FACSIMILE (206) 386-7344

Exhibit – C

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

SCOTT HAMILTON, as guardian ad litem for Z.H., Plaintiffs, vs. LINDA AMONDSON-MULLER, Personal Representative of the ESTATE of LAURA HAMILTON, Defendants.	No. 20-2-0054321 PLAINTIFF'S FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION TO DEFENDANT LINDA AMONDSON-MULLER **With objections and responses**

TO: Linda Amondson-Muller, Personal Representative of the Estate of Laura Hamilton

AND TO: All Attorneys of Record

Plaintiff, by and through their attorneys of record, Osborn Machler, pursuant to Civil Rules 26, 33, and 34, hereby propound the following First Set of Interrogatories and Requests to defendant Linda Amondson-Muller, Personal Representative of the Estate of Laura Hamilton.

OSBORN MACHLER
2025 First Ave., Suite 1200
Seattle, WA 98121
(206) 441-4110 (Tel)
(206) 441-4220 (Fax)

INTERROGATORY No. 19: If you contend that any third-party or entity in any way caused or contributed to Z.H.'s injury, please set forth as fully and completely as possible each such act, identifying fully each such person or entity by full name, current address, and stating how each such person or entity caused or contributed to plaintiff's injury.

ANSWER:

Not applicable. The natural forces of labor caused Z.H.'s injury.

INTERROGATORY No. 20: If you contend Z.H.'s injury was caused b an Act of God, please state the basis for this contention.

ANSWER: **See answer to Interrogatory No. 19.**

INTERROGATORY No. 21: State each and every fact on which you base your contention that the natural forces of labor were an Act of God.

ANSWER: **Z.H.'s injuries were the result of natural forces present during labor and were not caused by any negligence of Ms. Hamilton. The specifics regarding these natural forces of labor and the cause of Z.H.'s injury will be the subject of expert testimony. Testifying experts will disclose at a later date in accordance with the case scheduling order and to the extent required by the Civil Rules and governing case law.**

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

OSBORN MACHLER
2025 First Ave., Suite 1200
Seattle, WA 98121
(206) 441-4110 (Tel)
(206) 441-4220 (Fax)

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

INTERROGATORY No. 23: List and describe every medical journal, magazine, newsletter, circular, or other publication to which decedent subscribed to which she read to enhance her medical knowledge during the five years prior to the incident on April 9, 2014.

ANSWER:

Objection, as to "medical knowledge." Ms. Hamilton was a licensed midwife. Further objection as overbroad and unduly burdensome given that that this request calls for information from 7-12 years ago and Ms. Hamilton is deceased and thus cannot provide information or otherwise assist in answering.

Without waiving any objection, and based on information previously obtained in the prior lawsuit that plaintiff voluntarily dismissed, Answering Defendant responds as follows. Because of information available on the internet, Ms. Hamilton did not subscribe to journals. She frequently read a variety of websites involving healthcare and midwifery, including groups on Facebook, such as:

Home birth and waterbirth

Stop mandatory vaccinations

Doula and Lactation services

OSBORN MACHLER
2025 First Ave., Suite 1200
Seattle, WA 98121
(206) 441-4110 (Tel)
(206) 441-4220 (Fax)

Exhibit – D

SUPERIOR COURT OF WASHINGTON, LEWIS COUNTY

SCOTT HAMILTON, as guardian ad litem for Z.H., Plaintiff,	)
vs.	) 20-2-00543-21
LINDA AMONDSON-MULLER, Personal Representative of the Estate of Laura Hamilton, Defendant.	)

VIDEOTAPED REMOTE DEPOSITION UPON ORAL EXAMINATION OF

DOLLY BROWDER

9:00 a.m.

APRIL 13, 2022

(Via Zoom)

REPORTED BY: ELEANOR J. MITCHELL, RPR, CCR 3006

A. Well, the standard of care was part of the program, yes.

Q. So you did teach that to your students?

A. That's correct.

MS. MONIZ: Object to the form as vague.

MR. NEFF: I'll rephrase it.

Q. (BY MR. NEFF.) So you did teach your students about the standard of care, right?

MS. MONIZ: Object to the form.

A. Yeah, the form of the question's not correct because the standard of care is infused in the whole program. It's not a class that you take. It's -- it's the whole premise of midwifery.

Q. (BY MR. NEFF.) Okay. Can we agree that midwives are not allowed to needlessly endanger their patients?

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

A. Oh, goodness. Yeah, you -- definitely not.

Q. (BY MR. NEFF.) And in fact, the standard of care requires midwives, as medical providers, to avoid needlessly endangering their patients, right?

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

A. That's correct. You certainly are there to

answered.

A. No, I cannot.

Q. (BY MR. NEFF.) Okay. When it comes to patient safety, does a midwife in a home birth have more responsibilities than a doctor due to their lack of support staff?

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

A. I don't know that there's more responsibility. There is more -- there -- it's a different responsibility. They take on a different atmosphere when there's not, you know, five other people supporting the process in the room that also has the same training, usually.

Q. (BY MR. NEFF.) So they have different responsibilities when it comes to patient safety?

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

A. No. They have the same responsibility.

Q. (BY MR. NEFF.) Do you believe every patient has a right to medical care that meets the standard of care?

A. Yes.

Q. Does your answer to that last question change if the patient is a newborn baby?

A. No.

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

MS. MONIZ: Object to the form of the question. It's a legal question subject to jury instructions.

A. I can't -- I don't -- I can't answer that.

Q. (BY MR. NEFF.) You can't answer whether you agree or disagree that a midwife who falls below the standard of care and injures a child should be held accountable?

A. No. It's a very individual situation, and it completely depends on what happened.

Q. So in your mind, there can be a situation where a midwife falls below the standard of care and injures a child, and she's not held accountable?

MS. MONIZ: Object to the form of the question. This is a matter of legal determination according to the judge's ruling in a case.

MR. NEFF: Donna, I -- I'm going to have to ask you to stop with speaking objections. You're coaching the witness. And it -- this is not allowed under the court rules.

problem? Was it what the mother did?

I mean, it's just too many variables. I can't answer that question.

Q. (BY MR. NEFF.) Let me see if I can make it a little more clear. So in this situation, the midwife causes the injury by providing substandard care. Do you think that she should or should not be held accountable for that?

MS. MONIZ: Same objections.

A. So you're assuming that the midwife caused this?

Q. Correct.

A. And if there's a baby that is damaged and a midwife causes it, and it's -- legally she is -- you know, they -- that she is found guilty by a jury, I would go by what the jury decides.

Q. (BY MR. NEFF.) Okay. I can live with that answer.

Would you agree that one of the main reasons pregnant women seek out midwives and doctors is to ensure that labor and delivery is as safe as possible?

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

A. Yes.

Q. (BY MR. NEFF.) I'm going to shift gears here.

Or what...

Q. What should a midwife do?

A. Well, I -- I think I described that. The first is the assessment process. What's going on? Why is the baby not coming? And that takes, you know, 30 seconds to a minute to really determine what's happening with this.

And then if she determines that it is a shoulder that's caught and not coming, then the first usual is doing the McRoberts procedure or -- and then finding if they can turn the shoulders of the baby in one direction or another or the body of the baby, not the head. And then try maybe having the mom get on the hands and knees and delivering the posterior shoulder.

I'm not much of a fan for the Woods screw maneuver, but sometimes that can be helpful. So it's -- and then -- then the procedures get more and more risky after that, and sometimes physicians will do things that certainly midwives wouldn't do at home.

Q. Why are you not a fan of the screw maneuver?

A. I think it's too much maneuvering of the baby. I would rather have the mother move.

Q. Is it because the excess maneuvering of the baby creates a safety issue?

MS. MONIZ: Object to the form of the

different. Some states do allow midwives to perform breech deliveries at home, and others do not.

Our state also allowed midwives to attend births where a mother's had a previous Cesarian, and that's called a VBAC, V-B-A-C, and other states don't allow that. So it depends on the state.

Q. If a baby is large, is that a factor in determining whether a pregnancy is high risk?

A. No.

Q. So the size of the baby has nothing to do with whether a pregnancy is high risk or low risk?

A. Nope, not in terms of being able to perform the birth at home.

Q. And what's a low-risk pregnancy?

A. A low-risk pregnancy would be without any of those complications.

Q. Okay. Is there an additional category for pregnancy other than high risk and low risk?

A. I've never thought of that. No, I don't think so.

Q. So it's my understanding that you're aware of some studies comparing the safety of low-risk pregnancy home birth with low-risk pregnancy hospital births. Is that right?

A. Um-hmm.

THE REPORTER: Is that yes?

Q. (BY MR. NEFF.) You have to answer audibly.

A. Do I understand that I -- do I know that -- I'm sorry, Austin. What was the question again? Can you restate that?

Q. Are you aware of some studies comparing the safety of low-risk pregnancy home births with low-risk pregnancy hospital births?

A. Yes, I am aware.

Q. Are you aware of any studies comparing the safety of high-risk pregnancy home births with high-risk pregnancy hospital births?

A. No, I'm not.

Q. Is that because most of the time high-risk pregnancies only occur in the hospital?

A. That's correct. Yes.

Q. Is the age of the mother a factor in assessing with a pregnancy is high risk?

A. It depends. I think in our state there was no age limit. It was more -- it was considered high risk if a mother had more than six pregnancies, and then the midwife was asked to consult with another healthcare provider or physician about whether she would be considered a good candidate for a home birth.

Q. So age of the mother is not a factor in

assessing whether a pregnancy's high risk?

A. No.

Q. Do you personally believe that home birth is appropriate for a woman with a high-risk pregnancy?

A. No. I don't think high-risk pregnancy should occur in home -- in the home.

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

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

A. I thought that's what you just asked me. No, I don't think it's safe for a high-risk pregnancy to have a home birth.

Q. (BY MR. NEFF.) What should a midwife do if, during prenatal care, she determines a woman's pregnancy to be high risk?

A. She would refer that person to a physician who would do -- usually it's a physician that does high-risk pregnancies and births.

Q. Why is it important for a midwife to do that?

A. For the safety of the mother and the baby.

Q. Are there ways for midwives to estimate fetal weight during pregnancy?

A. There are methods that people try, and they

A. No.

Q. Are there situations when a midwife should recommend a C-section instead of a vaginal birth?

MS. MONIZ: Object to the form. Overly broad.

But you may answer.

A. Yeah, that's really huge. There's rare -- absolutely rare times that I would recommend a Cesarian. It's just -- I mean, there have been times where I've -- I've often even thought, Gee, this may be a difficult one because her last one was difficult. And then the baby just comes flying out or vice versa.

Q. (BY MR. NEFF.) So aside from what you would do, are there situations in which a midwife should recommend a Cesarian?

MS. MONIZ: Object to the form. Overbroad.

A. No. I -- I can't think of other than if the mother talks with the parents about whatever is going on, the parents and the midwife decide together if a Cesarian is more prudent.

Q. (BY MR. NEFF.) Knowing everything we know now, do you think it would have been safer for Seng Hamilton to have a C-section when she gave birth to Z.H.?

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

THE WITNESS: Should I answer?

Q. (BY MR. NEFF.) Yes.

A. I think that -- well, no --

MS. MONIZ: I maintain my objection. This -- it's an improper question.

But you may answer it.

THE WITNESS: Okay.

A. I think that, you know, if she had had a Cesarian and the same stuck problem existed when they got into the Cesarian, it was a very high chance that it would still happen. Because my summation clearly is that it was not the anterior shoulder that was injured. It was the posterior shoulder.

And that could have been hung up on something that would still have happened during a Cesarian.

Q. So what if the shoulder was not stuck, and Seng Hamilton underwent a C-section? Do you think that that would have been safer for Z.H.?

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

A. No, not necessarily. Cesarians are major surgery, and they can cause all kinds of other problems.

trial date that's coming up the end of June. That will be a little different rate but very similar.

Q. What will that rate be for trial?

A. I haven't decided yet. I haven't written that up yet.

Q. Okay. Have you ever reviewed a plaintiff's case? Probably not, right?

A. No. It's been -- all three have been the defense, um-hmm.

Q. Okay. If you were to review a plaintiff's case and formed the opinion that the midwife's care fell below the standard of care, would you be willing to testify against that midwife, or would you prefer just to not be involved?

A. No. I probably would be able to testify if it came to that, yes. No, I -- I would.

Q. So you would be willing to testify against a midwife?

A. Yes, if I felt there was a clear lack of whatever.

Q. So this is the last little section here. I -- swear, cross my heart, that we're almost done.

A. Gosh.

Q. Are you aware that the Estate of Laura Hamilton has asserted the affirmative defense that

Z.H.'s four-level brachial plexus avulsion injury was caused by an act of God?

MS. MONIZ: Object to the form of the question. That's a legal issue, and you know it, Mr. Neff. We've already been through that.

MR. NEFF: Oh, I'm just asking whether she's aware of the affirmative defense. Not any --

A. No, I'm not. No, I'm not -- I'm not aware of that. I'm sorry.

Q. (BY MR. NEFF.) So this is the first time you're hearing about that affirmative defense?

MS. MONIZ: Same objection. It's calling for a legal opinion from an expert witness. It's totally inappropriate, and you know it.

MR. NEFF: It's not calling for a legal opinion at all. I'm asking about her knowledge of the existence of the affirmative defense.

A. What -- my knowledge of what? I'm -- I'm confused about you're asking me to know. What...

Q. (BY MR. NEFF.) I'm just asking whether this is the first time you've heard about the Defendant Estate of Laura Hamilton's affirmative defense that the Z.H.'s injuries were caused by an act of God.

MS. MONIZ: Same objection.

A. Yeah. I -- I've not seen that. I'm not aware

of that.

Q. (BY MR. NEFF.) Are you a religious person, Ms. Browder?

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

Q. Would you say that --

A. But I don't go to church.

Q. So you don't go to church?

A. No.

Q. Are you a member of any religious denomination?

A. No.

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

A. That's just a personal question. I'd rather not answer that. That -- 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 a proper scope of questioning.

MR. NEFF: I disagree. But we could take it up with the judge later.

MS. MONIZ: Okay.

Q. (BY MR. NEFF.) Last question for you, Ms. Browder: Do you believe that God would act upon a

baby like Z.H. and cause him an injury?

MS. MONIZ: Object to the form.

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

Q. (BY MR. NEFF.) Have you heard anyone say that that shooting was an act of God?

A. No.

Q. That's it.

A. Okay.

Q. Thanks for bearing with me.

MS. MONIZ: All right. That's not it because I have some questions. But let's go ahead and take a break before we get to that.

THE WITNESS: Okay.

THE VIDEOGRAPHER: The time is 11:43 a.m. We're off the record.

(Recess taken.)

THE VIDEOGRAPHER: The time is 11:49 a.m. We're on the record.

EXAMINATION

Exhibit – E

SUPERIOR COURT OF WASHINGTON, LEWIS COUNTY

SCOTT HAMILTON, as guardian ad litem for Z.H., Plaintiff, vs. LINDA AMONDSON-MULLER, Personal Representative of the Estate of Laura Hamilton, Defendant.	20-2-00543-21

REMOTE DEPOSITION UPON ORAL EXAMINATION OF

LINDA AMONDSON-MULLER

11:00 a.m.

MAY 2, 2022

SEATTLE, WASHINGTON

(Via Zoom)

REPORTED BY: ELEANOR J. MITCHELL, RPR, CCR 3006

Q. (BY MR. NEFF.) Are you aware that you've asserted the affirmative defense that Zachary's four-level brachial plexus avulsion injury was caused by an act of God?

MS. MONIZ: Object to the form.

A. Yes.

Q. (BY MR. NEFF.) What's the factual basis for assertion of that affirmative defense?

A. Well, personally, I think that act of God and the natural forces of labor, as I -- as I read this, are one and the same. And so I guess that's the act-of-God part because of the natural forces of labor.

Q. Have you had any communications with God about Zachary's injuries?

MS. MONIZ: Object to the form of the question. It's rude, it's unacceptable, and it violates your obligations, Mr. Neff, as an officer of the court.

You may answer.

MR. NEFF: Well, we disagree on that.

A. I have not personally talked to God about it, no.

Q. (BY MR. NEFF.) Are you a religious person?

A. Do my religious beliefs need to be brought out into this case? I'm not really very comfortable with

that. I can tell you I'm not a very religious person.

Q. Do you belong to a religious denomination?

A. I'm a Christian.

Q. When was the last time you attended church?

A. About three months ago.

Q. And do you have an active relationship with God?

MS. MONIZ: I'm going to object again. This line of questioning is completely inappropriate and is going far beyond the -- the bounds of CR 11. And if you're going to persist, we're going to take a recess and bring a motion.

MR. NEFF: I have one more question.

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

MS. MONIZ: You may answer if you're comfortable. That's up to you.

A. I'm not really comfortable answering that.

MR. NEFF: Okay. So are you instructing her not to answer, Donna?

MS. MONIZ: The witness is making her choice based on a totally inappropriate and completely irrelevant question not reasonably calculated to lead to any admissible evidence in this case and harassment of the witness. She's made her choice.

Are you done asking questions? Or do you have something else appropriate to ask?

MR. NEFF: Well, Donna, we've been over this. We disagree whether or not this is relevant. We believe it's clearly relevant based on your decision to assert this affirmative defense. I have one more question.

MS. MONIZ: Mr. Neff, you persist in omitting the key facts that follow that phrase, "the natural forces of labor," which is what we've been discussing in this whole case, including all your experts as well as ours. And so --

MR. NEFF: And yet --

MS. MONIZ: -- this whole business is completely inappropriate.

MS. NEFF: Donna, the defendants made --

MS. MONIZ: Do you have proper questions for Ms. Amondson-Muller?

MR. NEFF: The defendants made the choice to frame this defense as an act of God in their answer by asserting that affirmative defense. That is a door you have opened, and we believe that this -- any of these questions are now relevant.

We can take it up with the court at a later date, and you're free to bring a motion. But please

let me ask my question. I only have one more --

MS. MONIZ: But you go far beyond what's appropriate.

MR. NEFF: I am aware that, in your mind, that is the case.

Q. (BY MR. NEFF.) Last question, Ms. Amondson-Muller: Do you believe that God would act upon a baby like Zachary and cause him a permanent injury?

MS. MONIZ: Object -- same objection as previously made.

You may answer.

A. Again, I don't feel comfortable with the terms that -- with what you're asking me.

Q. (BY MR. NEFF.) Okay. But -- so you're unable to answer that last question?

A. Correct.

Q. All right. I think that's it. I'd like a moment to confer with co-counsel, but I think that is everything.

MS. MONIZ: I may have some follow-up questions. So let's take a 10-minute break. Why don't you take this document down and we'll resume, or potentially resume, in a few minutes.

MR. NEFF: Okay.

(Recess taken.)

Q. (BY MR. NEFF.) Ms. Amondson-Muller, what do you think an "act of God" is?

MS. MONIZ: Same objections.

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

A. Pertaining to this case, the act of God is the natural force of labor.

Q. (BY MR. NEFF.) And it looks like you're looking down. Are you reading something while you're giving that answer?

A. No. Actually, I'm not.

Q. What about aside from this case? What is your understanding of the term "act of God," generally?

A. I have used that term loosely as a nurse when we don't have a definite answer, when it's not something concrete that maybe the medical profession knows about.

And the example would be: Sometimes, people look like they're going to live and they die. Sometimes, people die when they should have lived, and we don't have a clear-cut answer. And many times, as a nurse, I have said and others have said, Well, it's an act of God. It's somewhere in between.

That's why I refer to, in this case, they are

one and the same, the natural forces of labor and act of God.

Q. Okay.

A. It's something natural that happens. So go ahead.

Q. So it sounds like you've used that term as a nurse independent from any legal case you've been involved with?

A. That's correct. I truly haven't been involved in very many legal cases. So...

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

A. Yes, I believe so.

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

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

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

MS. MONIZ: You may answer.

A. Would you ask the question again?

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 Laura Hamilton was a good midwife.

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

MS. MONIZ: Same objections.

A. If I were asked that question, 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.

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

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

MS. MONIZ: Object to the form and all the

prior objections reasserted.

A. I'm not sure that I...

I'm not sure I can comfortably answer that.

Q. (BY MR. NEFF.) You can't comfortably answer whether or not you plan to testify about that?

MS. MONIZ: Object to the form. It's not up to this witness. Same objections. Also, way beyond the scope.

A. I don't know, at this point, exactly what I'm going to be asked at trial, so I don't really know how to answer the question. I've not been in this position before.

So are you going to ask me all these questions that we've -- that I've answered? I guess I'm confused about what I'm going to do in the future.

Q. (BY MR. NEFF.) I'm just asking whether you have plans to testify about this at trial.

MS. MONIZ: Object to the form of the question and reassert the multiple previous objections.

A. I am not an expert witness on every delivery that Laura's had. And so I don't feel comfortable still answering the question.

Q. (BY MR. NEFF.) All right. Well, we can end it there, I guess. Those are all my questions.

MS. MONIZ: I have a few follow-up

Exhibit – F

Pierce Rand

From: Austin Neff <ANeff@osbornmachler.com>
Sent: Monday, May 2, 2022 10:50 AM
To: Donna Moniz; Jenine Michaelis; Pierce Rand; Jennifer Sproul; Monica Welch
Cc: Susan Machler; Sim Osborn
Subject: RE: Hamilton v. Hamilton personal representative deposition

Donna,

The issue is what "act of God" means to the jury. Please make your objections and we can address the issue before the court at a later date.

Austin Neff | Attorney
Osborn Machler
2025 First Avenue | Suite 1140 | Seattle, WA 98121
206-441-4110 (phone) | 206-441-4220 (fax)
www.osbornmachler.com

Privileged and Confidential Communication. If you are not the addressee, you may not read, copy or distribute this email. If you receive this email in error, please advise us by return email and call (206) 441-4110. Thank you.

Osborn Machler was named the Best Lawyers™ "Law Firm of the Year" in Information Plaintiff Personal Injury Law in the United States for the 2020 Edition.

From: Donna Moniz <monizd@JGKMW.com>
Sent: Friday, April 29, 2022 10:54 AM
To: Austin Neff <ANeff@osbornmachler.com>; Jenine Michaelis <jmichaelis@osbornmachler.com>; Pierce Rand <randp@JGKMW.com>; Jennifer Sproul <sproulj@JGKMW.com>; Monica Welch <WelchM@JGKMW.com>
Cc: Susan Machler <Smachler@osbornmachler.com>; Sim Osborn <sosborn@osbornmachler.com>
Subject: RE: Hamilton v. Hamilton personal representative deposition

Austin,

Your position is disingenuous. As you know, act of God is a know legal defense. It was clarified in our answer and in discovery responses to specify the natural forces of labor. This is what has been discussed by most of the experts for both sides and was affirmed as a legitimate medical and legal theory in the LM v Hamilton case. Laura Hamilton was a devout Christian. However, religious questions to our expert or the personal representative are not appropriate. I urge you to reconsider the scope of questioning in order to avoid having to recess the deposition to get the court's ruling on this or other matters.

Donna

From: Austin Neff <ANeff@osbornmachler.com>
Sent: Tuesday, April 26, 2022 11:04 AM

To: Donna Moniz <monizd@JGKMW.com>; Jenine Michaelis <jmichaelis@osbornmachler.com>; Pierce Rand <randp@JGKMW.com>; Jennifer Sproul <sproulj@JGKMW.com>; Monica Welch <WelchM@JGKMW.com>
Cc: Susan Machler <Smachler@osbornmachler.com>; Sim Osborn <sosborn@osbornmachler.com>
Subject: RE: Hamilton v. Hamilton personal representative deposition

Donna,

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

We also intend to ask Ms. Amondson-Muller if it is her understanding that recovery in this case is limited to funds available under the applicable insurance policy. Other than that, do not intend to ask questions about the assets or value of Laura Hamilton's estate.

Again, since the defense is raising this issue, it is incumbent upon the defense to articulate their concerns. Plaintiffs have now addressed concerns regarding elicitation of privileged testimony, the act of God defense, and questions about the assets of the estate. You are not entitled to advanced notice regarding the topics of a discovery deposition; however, plaintiffs are more than willing to address any additional concerns you can articulate. We object to your attempted reservation of the right to recess the deposition given the fact you seem unable or unwilling to articulate any additional concerns.

Austin Neff | Attorney
Osborn Machler
2025 First Avenue | Suite 1140 | Seattle, WA 98121
206-441-4110 (phone) | 206-441-4220 (fax)
www.osbornmachler.com

Privileged and Confidential Communication. If you are not the addressee, you may not read, copy or distribute this email. If you receive this email in error, please advise us by return email and call (206) 441-4110. Thank you.

Osborn Machler was named the Best Lawyers™ "Law Firm of the Year" in Information Plaintiff Personal Injury Law in the United States for the 2020 Edition.

From: Donna Moniz <monizd@JGKMW.com>
Sent: Monday, April 25, 2022 5:06 PM
To: Austin Neff <ANeff@osbornmachler.com>; Jenine Michaelis <jmichaelis@osbornmachler.com>; Pierce Rand <randp@JGKMW.com>; Jennifer Sproul <sproulj@JGKMW.com>; Monica Welch <WelchM@JGKMW.com>
Cc: Susan Machler <Smachler@osbornmachler.com>; Sim Osborn <sosborn@osbornmachler.com>
Subject: RE: Hamilton v. Hamilton personal representative deposition

Austin,

Considering your refusal to provide the general subject matter on which you plan to question the PR, Ms. Amondson-Muller, I must, again, express my concerns about Plaintiffs' motivation for requesting her deposition. Ms. Amondson-

Muller is not a midwife and had no involvement in the care at issue, whatsoever. Her potential admissible testimony is limited. You have referenced her signature on the discovery responses, but as I pointed out the questions asked about privileged, improper or information not reasonably calculated to lead to admissible evidence.

Any attempt to question her about the assets or value of Ms. Hamilton's estate would be improper. This is irrelevant as Plaintiffs commenced this lawsuit under RCW 11.40.060, so the liability policy is the only source of compensation available in the unlikely event of a Plaintiff verdict at trial. Moreover, any attempt to question Ms. Amondson-Muller about her religion and/or relationship with God is irrelevant, improper, and would constitute harassment. You asked these questions during the deposition of Ms. Browder. Saying that an injury was caused by an "Act of God" is a term of art commonly understood to mean that it was caused by a natural force, not any person's negligence, as further clarified by stating "the natural forces of labor". It is not about religion. You certainly know this and have encountered the term "Act of God" previously. Most likely, if you have a homeowner, rental, or car insurance policy, it is probably used there.

These are but two examples of improper and objectionable subject matter that I can foresee the Plaintiffs trying to explore during Ms. Amondson Muller's deposition. There may be others that I cannot predict. Your refusal to be disclose the scope of intended questioning prevents us from moving for protective order prior to the deposition under the doctrine of ripeness. As such, I reserve the right to recess the deposition and move for protective order in the event that your questions attempt to explore irrelevant or privileged subjects, or if it appears that the intent is to harass the witness rather than obtain valid discovery. It is my hope that this will not be necessary.

Donna

Donna M. Moniz

JGK M&W Johnson Graffe Keay Moniz & Wick LLP
When reputation matters

925 Fourth Avenue, Suite 2300
Seattle, WA 98104
Phone: (206) 223-4770
Fax: (206) 386-7344

From: Austin Neff <ANeff@osbornmachler.com>
Sent: Tuesday, April 12, 2022 10:23 AM
To: Donna Moniz <monizd@JGKMW.com>; Jenine Michaelis <jmichaelis@osbornmachler.com>; Pierce Rand <randp@JGKMW.com>; Jennifer Sproul <sproulj@JGKMW.com>; Monica Welch <WelchM@JGKMW.com>
Cc: Susan Machler <Smachler@osbornmachler.com>; Sim Osborn <sosborn@osbornmachler.com>
Subject: RE: Hamilton v. Hamilton personal representative deposition

Donna,

The attorney undersigning the notice of deposition warrants it is not being filed for an improper purpose pursuant to CR 11. I can also assure you that I will not intentionally attempt to elicit privileged information.

Since you are raising this issue, I think you should fully articulate any additional areas of concern. I'm happy to address them. I agree Judge Lawler does not want to hear another discovery motion, especially one based on speculation that opposing counsel may not follow the court rules.

Austin Neff | Attorney
Osborn Machler
2025 First Avenue | Suite 1140 | Seattle, WA 98121

206-441-4110 (phone) | 206-441-4220 (fax)
www.osbornmachler.com

Privileged and Confidential Communication. If you are not the addressee, you may not read, copy or distribute this email. If you receive this email in error, please advise us by return email and call (206) 441-4110. Thank you.

OSBORN MACHLER, PLLC 2020
RECOGNIZED BY
Best Lawyers

Osborn Machler was named the Best Lawyers™ "Law Firm of the Year" in Information Plaintiff Personal Injury Law in the United States for the 2020 Edition.

From: Donna Moniz <monizd@JGKMW.com>
Sent: Monday, April 11, 2022 5:13 PM
To: Austin Neff <ANeff@osbornmachler.com>; Jenine Michaelis <jmichaelis@osbornmachler.com>; Pierce Rand <randp@JGKMW.com>; Jennifer Sproul <sproulj@JGKMW.com>; Monica Welch <WelchM@JGKMW.com>
Cc: Susan Machler <Smachler@osbornmachler.com>; Sim Osborn <sosborn@osbornmachler.com>
Subject: RE: Hamilton v. Hamilton personal representative deposition

Austin,

I reviewed the interrogatories and requests for production. Much of the requested information was privileged. I expect the deposition will involve many areas of instructions not to answer if you pursue the same line of questioning. This makes me wonder about the intent of the deposition and whether it is for an improper purpose.

Please give some idea of the areas you intend to explore. If it is limited to non-privileged matters addressed in written discovery, then say so. Otherwise, let's work this out. I doubt Judge Lawler wants to hear another discovery motion.

Donna

Donna M. Moniz

JGK M&W Johnson Graffe Keay Moniz & Wick LLP
When reputation matters

925 Fourth Avenue, Suite 2300
Seattle, WA 98104
Phone: (206) 223-4770
Fax: (206) 386-7344

From: Austin Neff <ANeff@osbornmachler.com>
Sent: Monday, April 11, 2022 9:54 AM
To: Donna Moniz <monizd@JGKMW.com>; Jenine Michaelis <jmichaelis@osbornmachler.com>; Pierce Rand <randp@JGKMW.com>; Jennifer Sproul <sproulj@JGKMW.com>; Monica Welch <WelchM@JGKMW.com>
Cc: Susan Machler <Smachler@osbornmachler.com>; Sim Osborn <sosborn@osbornmachler.com>
Subject: RE: Hamilton v. Hamilton personal representative deposition, Burgess and Knowles

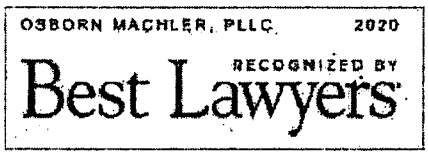
Good morning Donna,

Ms. Amondson-Muller signed interrogatory answers under oath. I think the Court will agree that we're entitled to explore her knowledge instead of simply taking your word that she has none. If a question during deposition invites an answer that you believe contains privileged information, then I'm sure you will object.

I am happy to meet for a discovery conference if you feel the need to move for a protective order. Otherwise, please provide available dates for Ms. Amondson-Muller's deposition.

Austin Neff | Attorney
Osborn Machler
2025 First Avenue | Suite 1140 | Seattle, WA 98121
206-441-4110 (phone) | 206-441-4220 (fax)
www.osbornmachler.com

Privileged and Confidential Communication. If you are not the addressee, you may not read, copy or distribute this email. If you receive this email in error, please advise us by return email and call (206) 441-4110. Thank you.



Osborn Machler was named the Best Lawyers™ "Law Firm of the Year" in Information Plaintiff Personal Injury Law in the United States for the 2020 Edition.

From: Donna Moniz <monizd@JGKMW.com>
Sent: Friday, April 8, 2022 11:27 AM
To: Austin Neff <ANeff@osbornmachler.com>; Jenine Michaelis <jmichaelis@osbornmachler.com>; Pierce Rand <randp@JGKMW.com>; Jennifer Sproul <sproulj@JGKMW.com>; Monica Welch <WelchM@JGKMW.com>
Cc: Susan Machler <Smachler@osbornmachler.com>; Sim Osborn <sosborn@osbornmachler.com>
Subject: RE: Hamilton v. Hamilton personal representative deposition, Burgess and Knowles

Austin,

Discovery must be reasonably calculated to lead to admissible evidence under CR 26. If you want to question her about her relationship with Laura, that's perfectly fine. However, Ms. Amondson-Muller had no involvement in the care or events in this case. She is not a midwife. She has been assigned to represent the estate under the special statute which limits recovery. Most or all of what she knows of the case is privileged. If you will not disclose generally the subject matter of your questioning then we are concerned about the purpose of this deposition. We may need to move for protective order. Please advise so that we can hold a discovery conference to discuss this issue if necessary.

Donna

Donna M. Moniz

JGK M&W Johnson Graffe Keay Moniz & Wick LLP
When reputation matters

925 Fourth Avenue, Suite 2300
Seattle, WA 98104
Phone: (206) 223-4770

Fax: (206) 386-7344

From: Austin Neff <ANeff@osbornmachler.com>
Sent: Wednesday, April 6, 2022 2:40 PM
To: Donna Moniz <monizd@JGKMW.com>; Jenine Michaelis <jmichaelis@osbornmachler.com>; Pierce Rand <randp@JGKMW.com>; Jennifer Sproul <sproulj@JGKMW.com>; Monica Welch <WelchM@JGKMW.com>
Cc: Susan Machler <Smachler@osbornmachler.com>; Sim Osborn <sosborn@osbornmachler.com>
Subject: RE: Hamilton v. Hamilton personal representative deposition, Burgess and Knowles

Donna,

We are not aware of any authority requiring a party to provide advance disclosure of the subject matter for a discovery deposition. If such authority exists, please advise.

Our expectation is that you will produce the PR for deposition. Can we please settle on a mutually agreeable date and time?

Austin Neff | Attorney
Osborn Machler
2025 First Avenue | Suite 1140 | Seattle, WA 98121
206-441-4110 (phone) | 206-441-4220 (fax)
www.osbornmachler.com

Privileged and Confidential Communication. If you are not the addressee, you may not read, copy or distribute this email. If you receive this email in error, please advise us by return email and call (206) 441-4110. Thank you.

OSBORN MACHLER, PLLC 2020
RECOGNIZED BY
Best Lawyers

Osborn Machler was named the Best Lawyers™ "Law Firm of the Year" in Information Plaintiff Personal Injury Law in the United States for the 2020 Edition.

From: Donna Moniz <monizd@JGKMW.com>
Sent: Wednesday, April 6, 2022 2:09 PM
To: Jenine Michaelis <jmichaelis@osbornmachler.com>; Pierce Rand <randp@JGKMW.com>; Jennifer Sproul <sproulj@JGKMW.com>; Monica Welch <WelchM@JGKMW.com>
Cc: Susan Machler <Smachler@osbornmachler.com>; Sim Osborn <sosborn@osbornmachler.com>; Austin Neff <ANeff@osbornmachler.com>
Subject: RE: Hamilton v. Hamilton personal representative deposition, Burgess and Knowles

I am still waiting for an answer on the subject matter.

Donna M. Moniz

JGK M&W Johnson Graffe Keay Moniz & Wick LLP
When reputation matters

925 Fourth Avenue, Suite 2300
Seattle, WA 98104

Phone: (206) 223-4770
Fax: (206) 386-7344

From: Jenine Michaelis <jmichaelis@osbornmachler.com>
Sent: Friday, April 1, 2022 10:41 AM
To: Donna Moniz <monizd@JGKMW.com>; Pierce Rand <randp@JGKMW.com>; Jennifer Sproul <sproulj@JGKMW.com>; Monica Welch <WelchM@JGKMW.com>
Cc: Susan Machler <Smachler@osbornmachler.com>; Sim Osborn <sosborn@osbornmachler.com>; Austin Neff <ANeff@osbornmachler.com>
Subject: RE: Hamilton v. Hamilton personal representative deposition, Burgess and Knowles

Susan says 1 ½ hour at most for the PR.

Thanks.

Jenine Michaelis
Paralegal
OSBORN MACHLER
2025 First Avenue, Suite 1140
Seattle, WA 98121
Phone: 206-441-4110
Fax: 206-441-4220
www.osbornmachler.com

Privileged and Confidential Communication. If you are not the addressee, you may not read, copy or distribute this email. If you receive this email in error, please advise us by return email and call (206) 441-4110. Thank you.

Osborn Machler was named the Best Lawyers "Law Firm of the Year" in Information Plaintiff Personal Injury Law in the United States for the 2020 Edition.

From: Donna Moniz <monizd@JGKMW.com>
Sent: Wednesday, March 30, 2022 5:46 PM
To: Jenine Michaelis <jmichaelis@osbornmachler.com>; Pierce Rand <randp@JGKMW.com>; Jennifer Sproul <sproulj@JGKMW.com>; Monica Welch <WelchM@JGKMW.com>
Cc: Susan Machler <Smachler@osbornmachler.com>; Sim Osborn <sosborn@osbornmachler.com>; Austin Neff <ANeff@osbornmachler.com>
Subject: RE: Hamilton v. Hamilton personal representative deposition, Burgess and Knowles

Jenine, We will work on setting Mary Burgess. As for the PR, we are happy to set that too. However, we would like to let her know how long to allow and what the subject areas will be. As you know, she is not a midwife and will not be testifying about standard of care. Eric Knowles does not have a report. However, once he reviews the Brandt deposition, we will decide about whether to ask him to do a report or a deposition. Thanks. Donna

---

From: Jenine Michaelis <jmichaelis@osbornmachler.com>
Sent: Wednesday, March 30, 2022 11:50 AM
To: Donna Moniz <monizd@JGKMW.com>; Pierce Rand <randp@JGKMW.com>; Jennifer Sproul <sproulj@JGKMW.com>; Monica Welch <WelchM@JGKMW.com>
Cc: Susan Machler <Smachler@osbornmachler.com>; Sim Osborn <sosborn@osbornmachler.com>; Austin Neff <ANeff@osbornmachler.com>
Subject: Hamilton v. Hamilton

We would like to take the deposition of the PR Linda Amondson-Muller as well as your new expert, Mary Burgess.

I still have not received a response if Eric Knowles has a report. If he has a report, we may not need to take his deposition.

Thank you.

Jenine Michaelis
Paralegal
OSBORN MACHLER
2025 First Avenue, Suite 1140
Seattle, WA 98121
Phone: 206-441-4110
Fax: 206-441-4220
www.osbornmachler.com

Privileged and Confidential Communication. If you are not the addressee, you may not read, copy or distribute this email. If you receive this email in error, please advise us by return email and call (206) 441-4110. Thank you.

Osborn Machler was named the Best Lawyers "Law Firm of the Year" in Information Plaintiff Personal Injury Law in the United States for the 2020 Edition.

Disclaimer

The information contained in this communication from the sender is confidential. It is intended solely for use by the recipient and others authorized to receive it. If you are not the recipient, you are hereby notified that any disclosure, copying, distribution or taking action in relation of the contents of this information is strictly prohibited and may be unlawful.

Disclaimer

The information contained in this communication from the sender is confidential. It is intended solely for use by the recipient and others authorized to receive it. If you are not the recipient, you are hereby notified that any disclosure, copying, distribution or taking action in relation of the contents of this information is strictly prohibited and may be unlawful.

Disclaimer

The information contained in this communication from the sender is confidential. It is intended solely for use by the recipient and others authorized to receive it. If you are not the recipient, you are hereby notified that any disclosure, copying, distribution or taking action in relation of the contents of this information is strictly prohibited and may be unlawful.

Disclaimer

The information contained in this communication from the sender is confidential. It is intended solely for use by the recipient and others authorized to receive it. If you are not the recipient, you are hereby notified that any disclosure, copying, distribution or taking action in relation of the contents of this information is strictly prohibited and may be unlawful.

Disclaimer

The information contained in this communication from the sender is confidential. It is intended solely for use by the recipient and others authorized to receive it. If you are not the recipient, you are hereby notified that any disclosure, copying, distribution or taking action in relation of the contents of this information is strictly prohibited and may be unlawful.

Disclaimer

The information contained in this communication from the sender is confidential. It is intended solely for use by the recipient and others authorized to receive it. If you are not the recipient, you are hereby notified that any disclosure, copying, distribution or taking action in relation of the contents of this information is strictly prohibited and may be unlawful.

Exhibit – G

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,	)	
VS.	)	CASE NO. 20-2-00543-21
LINDA AMONDSON-MULLER, PERSONAL REPRESENTATIVE OF THE ESTATE OF LAURA HAMILTON,	)	
DEFENDANTS.	)	

VIDEOTAPED DEPOSITION OF MICHAEL FREEMAN, MedDr., Ph.D.

THURSDAY, APRIL 28, 2022, 11:03 A.M.

Reported by Laury Wasoff, Washington CSR No. 3506, RPR
Job No. 852086

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,	)	
VS.	)	CASE NO. 20-00543-21
LINDA AMONDSON-MULLER, PERSONAL REPRESENTATIVE OF THE ESTATE OF LAURA HAMILTON,	)	
DEFENDANTS.	)	

VIDEOTAPED REMOTE DEPOSITION OF MICHAEL FREEMAN, MedDr., Ph.D., taken on Thursday, April 28, 2022 at 11:03 A.M. via videoconference before Laury Wasoff, Certified Shorthand Reporter, in and for the State of Washington.

APPEARANCES OF COUNSEL:

FOR THE PLAINTIFF:

OSBORN MACHLER
BY: SUSAN MACHLER, ESQ.
AUSTIN NEFF, ESQ.
2025 First Avenue
Suite 1200
Seattle, Washington 98121
(206) 441-4110
smachler@osbornmachler.com
aneff@osbornmachler.com

FOR THE DEFENDANT:

JOHNSON, GRAFFE, KEAY, MONIZ & WICK, LLP
BY: DONNA M. MONIZ, ESQ.
PIERCE RAND, ESQ.
925 Fourth Avenue
Suite 2300
Seattle, Washington 98104
(206) 223-4770
monizd@jgkmw.com
randp@jgkmw.com

ALSO PRESENT:

MAY SEVIL, VIDEOGRAPHER

I N D E X

WITNESS: MICHAEL D. FREEMAN, MedDr., Ph.D.

EXAMINATION BY:	PAGE
MS. MONIZ	6, 132
MS. MACHLER	125

EXHIBITS

EXHIBIT		MARKED
Exhibit 1	February 2022 Curriculum Vitae	12
Exhibit 2	March 2022 Curriculum Vitae	14
Exhibit 3	Order on Defendant's Motion to Exclude Plaintiff's Expert Dr. Freeman	31
Exhibit 4	Dr. Freeman's Notes, 39 pages	32
Exhibit 5	Amicus Curiae Brief of Dr. Michael D. Freeman, In Re L.M., a minor, v. Hamilton	102
Exhibit 6	List of Production Materials	109
Exhibit 7	Subpoena Duces Tecum for Dr. Freeman	109
Exhibit 8	Billing Invoices (Not Attached)	112
Exhibit 9	12/19/86 Letter from Western States Chiropractic College to Freeman	117
Exhibit 10	Article, Stern and Brown, Litigating Brain Injuries	118

THURSDAY, APRIL 28, 2022, 11:03 A.M.

THE VIDEOGRAPHER: Good morning. Here begins the remote deposition of Dr. Michael D. Freeman in the matter of Scott Hamilton, et al. versus Linda Amondson-Muller, et al. This case is in the Superior Court of the State of Washington, County of Lewis. The case number is 20-2-00543-21.

11:03:12 Today's date is April 28, 2022. The time
11:03:15 is 11:03 A.M. Pacific Standard Time. This is a
11:03:21 remote deposition through Zoom videoconferencing.
11:03:26 The videographer is May Sevil, appearing on behalf
11:03:29 of Centext Litigation Services.
11:03:30 Would counsel please identify yourselves
11:03:33 and state whom you represent.
11:03:36 MS. MACHLER: My name is Susan Machler. I
11:03:39 represent the plaintiff.
11:03:41 MR. NEFF: Austin Neff. I also represent the
11:03:44 plaintiff.
11:03:45 MS. MONIZ: Donna Moniz for defendant the estate
11:03:46 of Laura Hamilton. And also Pierce Rand for the
11:03:50 estate.
11:03:51 THE VIDEOGRAPHER: Thank you.
11:03:52 The reporter today is Laury Wasoff with
11:03:55 Centext. Would the reporter please swear in the

witness.

MICHAEL D. FREEMAN, MedDr., PH.D.,
the witness herein, having been first duly
sworn remotely, testified as follows:

EXAMINATION

BY MS. MONIZ:

Q. Would you state your full name for the record, please.

A. Michael Freeman. Middle initial D.

Q. What does the D stand for?

A. David.

Q. Sorry. What was that?

A. David.

Q. And what is your business address?

A. I can only give you a post office box. We're a virtual office. That is P.O. Box 963309, Portland, Oregon 97296.

Q. And at some point did you have a brick-and-mortar office?

A. I did until last -- was it July? Yes. I've had a place to go since I was in kindergarten that was not my home. But as of the COVID changes, we altered the way we run our practice now.

11:05:19 **Q. Now, Doctor, approximately how many times**
11:05:23 **have you had your deposition taken?**
11:05:25 A. I'd say more than 1,100 or 1,200.
11:05:30 **Q. And based on that experience, you know that**
11:05:33 **when I ask a question, your answer is meant to be**
11:05:38 **responsive to the question. Correct?**
11:05:40 A. That is always my intent. I do understand
11:05:44 that.
11:05:44 **Q. And that means when I ask you if you used**
11:05:47 **to have a brick-and-mortar office, it's not**
11:05:50 **necessary to talk about kindergarten. Right?**
11:05:56 A. It was for my answer. It was something
11:05:58 that I thought would be helpful to be explanatory.
11:06:01 **Q. Well, you're charging us how much per hour**
11:06:06 **today?**
11:06:08 A. I don't know, actually. I'm not sure when
11:06:10 this case first came to me. My current rate is $900
11:06:14 per hour, but I think before that it was 850.
11:06:19 **Q. So you don't know as you sit here today**
11:06:21 **whether you're charging us 850 or $900 an hour?**
11:06:26 A. I don't.
11:06:27 **Q. And so whether it's 850 or $900 an hour, I**
11:06:31 **would appreciate it if you would give a concise**
11:06:34 **answer to the question rather than using up the time**
11:06:39 **we have on extraneous information.**

11:06:45 **Now, you understand that you're under oath.**
11:06:48 **Correct?**
11:06:50 A. It is correct that I understand I'm under
11:06:53 oath.
11:06:53 **Q. And you don't have a current office, so**
11:06:56 **where are you located today when you're giving your**
11:06:59 **deposition?**
11:07:00 A. Salem, Oregon.
11:07:04 **Q. Sorry. Say that again.**
11:07:07 A. Salem, Oregon.
11:07:09 **Q. Salem. Okay. Now, as I understand it, you**
11:07:17 **hold yourself out as a forensic epidemiologist.**
11:07:21 **Correct?**
11:07:23 A. I can't say what your understanding is.
11:07:28 **Q. Do you hold yourself out as a forensic**
11:07:30 **epidemiologist?**
11:07:32 A. That is part of my training, yes.
11:07:36 **Q. Have you ever worked as an epidemiologist**
11:07:39 **in a hospital?**
11:07:40 A. No.
11:07:41 **Q. Have you ever worked as an epidemiologist**
11:07:44 **in some other kind of healthcare setting other than**
11:07:47 **a hospital?**
11:07:49 A. Yes. I've been a medical school professor
11:07:52 of epidemiology for almost a quarter of a century.

11:07:58 **Q. Other than your professorship, which we'll**
11:08:02 **go into shortly, have you ever been in a setting in**
11:08:07 **which you actually provided epidemiological services**
11:08:13 **other than a teaching capacity?**
11:08:19 A. Well, I've worked as an expert in both
11:08:21 criminal and civil matters providing expert
11:08:25 epidemiologic information for almost a quarter
11:08:30 century as well.
11:08:34 **Q. Dr. Freeman, have you ever worked in a**
11:08:37 **healthcare setting other than a medical school as an**
11:08:41 **epidemiologist?**
11:08:46 A. No, I can't say that I've worked in a
11:08:49 healthcare setting.
11:08:50 **Q. Have you ever worked in a public health**
11:08:51 **department as an epidemiologist?**
11:08:55 A. Yes. I was a professor of public health
11:08:58 and preventive medicine at Oregon Health and Science
11:09:01 University School of Medicine for what? 15, 16
11:09:05 years, something like that. And that school or that
11:09:10 department is part of the -- part of the public
11:09:14 health service in Oregon.
11:09:22 **Q. What part of the public health service in**
11:09:28 **Oregon is it?**
11:09:30 A. I couldn't tell you exactly, but we had --
11:09:34 we had state departments blended in with our

department. And I can't give you specifics. The department was absorbed into the new school of public health in 2014, I believe. So I can't point to a website or anything like that to show you what the current status is.

Q. The state health department that you believe you were connected to in Oregon prior to them being blended into OHSU, what services did they provide?

A. Couldn't tell you. Wasn't part of my job.

Q. So even though you worked for the Oregon Health Sciences University in the medical school, you did not perform any services related to the public health agency that they were affiliated with. Correct?

MS. MACHLER: Object to the form.

THE WITNESS: That was a department I think called CROET, C-R-O-E-T. I think that was the state department that was mixed with us. And there might have been other ones too, and which is the Center for Research on Occupational and Environmental Toxicology. And that I believe is the one that is the department of public health. But I couldn't tell you that for sure, nor could I tell you if that's the limitation of the affiliations with my

department.

Q. BY MS. MONIZ: Other than your teaching at Oregon Health and Sciences University, did you provide any services in the field of epidemiology to any agency in the state of Oregon?

A. Yes.

Q. What?

A. I worked as a consultant to the state medical examiner for about eight to ten years, providing analysis of fatalities in crashes and blending in epidemiologic analysis into my forensic medical analysis and testifying in a number of homicide prosecutions for the state.

Q. Would it be fair to say, Dr. Freeman, that your work in epidemiology has been limited to your forensic work and teaching?

A. Well, also my research and publications. So no, it wouldn't be fair to say that.

Q. Have you ever provided direct services in the field of epidemiology other than forensic teaching or your research on crashes?

A. I don't know what you mean by "direct services."

Q. Okay. And is that because you've never practiced in the field of epidemiology outside of

11:12:40 **your forensic work?**

11:12:41 A. No. It's because I don't understand your

11:12:43 question.

11:12:44 **Q. You don't understand what work in the field**

11:12:46 **of epidemiology means?**

11:12:49 A. I don't understand what you mean when you

11:12:50 say direct services.

11:13:02 **Q. Forensic means pertaining to litigation.**

11:13:05 **Correct?**

11:13:08 A. Not precisely, no.

11:13:10 **Q. A forensic epidemiologist is a professional**

11:13:17 **expert. Right?**

11:13:18 A. Not necessarily, no. Might be a purely

11:13:20 academic position.

11:13:24 **Q. How much of your professional time is spent**

11:13:29 **with forensic work currently?**

11:13:33 A. My forensic consulting practice takes up

11:13:36 about 70 percent of my time.

11:13:44 **Q. And approximately 80 percent of that**

11:13:47 **forensic work is civil litigation. Is that right?**

11:13:51 A. That's correct.

11:13:58 **Q. Let's mark your curriculum vitae as**

11:14:02 **Exhibit 1.**

11:14:23 (Whereupon Exhibit 1 was marked for

11:14:23 identification by the Court Reporter.)

11:14:30 **Q. BY MS. MONIZ: Dr. Freeman, would you go**
11:14:32 **ahead and tell us whether this is a current copy of**
11:14:39 **your CV, which appears to be 27 pages. And let our**
11:14:45 **video tech know if you need her to scroll down and**
11:14:48 **show you additional portions of it.**
11:14:53 A. I don't need anybody to scroll it because
11:14:55 it's got the date at the top. That is not my
11:14:58 current CV. My most current CV I believe is dated
11:15:01 March of 2022.
11:15:03 **Q. Have you provided that to Ms. Machler?**
11:15:07 A. I have no idea.
11:15:13 **Q. What has been added to your CV since March**
11:15:17 **of 2022 or since -- between February and March of**
11:15:21 **2022?**
11:15:23 A. I'd have to go through it and look.
11:15:26 **Q. You don't have any memory of making any**
11:15:28 **changes in the last month?**
11:15:33 A. No, I don't. It gets changed every month,
11:15:36 and there are constantly things being added to it.
11:15:41 **Q. Okay. Was this curriculum vitae complete**
11:15:46 **and accurate as of February of 2022?**
11:15:51 A. It was.
11:15:54 **Q. All right. Let's scroll down through the**
11:15:57 **first -- that first page there, and we can stop**
11:16:02 **there.**

11:16:04 **As I understand it, you went to medical**
11:16:05 **school in Antigua?**
11:16:08 A. Yes.
11:16:09 **Q. That's not on your CV, is it?**
11:16:12 A. I only have my degreed education on my CV.
11:16:16 **Q. So your medical school courses that you**
11:16:20 **took in Antigua are not included in your CV. Is**
11:16:24 **that correct?**
11:16:24 A. I don't have any courses that I've taken
11:16:26 included on my CV, so that is correct.
11:16:31 **Q. So this is Exhibit 1, and we'll reserve**
11:16:35 **Exhibit 2 for your current CV. Will you supply that**
11:16:38 **to Ms. Machler, please?**
11:16:41 A. I sure will.
11:16:49 (Whereupon Exhibit 2 was marked for
11:16:49 identification by the Court Reporter.)
11:16:50 **Q. BY MS. MONIZ: Okay. Now, as I understand**
11:16:51 **it, the medical school in Antigua, which is another**
11:16:57 **country, is a four-and-a-half-year program. Was**
11:17:01 **that the case when you attended?**
11:17:04 A. No. I attended on a fifth pathway program,
11:17:10 which is different than the traditional students who
11:17:13 were there on campus. It was intended to provide me
11:17:17 with my clinical rotations, which I did in the
11:17:20 United States. So it would have taken -- probably

would have taken about four and a half years for me to complete it. I got through about three years before I withdrew.

Q. So the first two years at the medical school in Antigua included what?

A. The first two years that I did at the medical school in Antigua?

Q. Yes.

A. I think there was some courses that were required like in pathology and pharmacology. All my other coursework was transferred from my first two years at chiropractic school because it was all basic sciences and identical to the medical school curriculum. And then I think it was after about -- you know, no, you know, I don't even remember very well anymore because it was 1999 to 2002. But I would estimate that after about six months, then clinical rotations began.

Q. So it's your testimony that you did six months of medical school in Antigua for the actual classwork?

A. No. My testimony is what my testimony is, and that's not what I testified to.

Q. Dr. Freeman, how many months or years did you spend in Antigua studying medicine?

11:18:51 A. I did not go to Antigua during my three
11:18:53 years that I was enrolled in the school.
11:18:56 **Q. So you attended the school without ever**
11:18:59 **going there locally?**
11:19:01 A. At the time that I withdrew, that is
11:19:03 correct.
11:19:07 **Q. So you indicated you were able to transfer**
11:19:10 **some courses from chiropractic school. What courses**
11:19:16 **did you take in addition to those during the six**
11:19:22 **months or so of the coursework?**
11:19:26 A. You mean aside from the ones that I've
11:19:29 already answered that question with?
11:19:33 **Q. Well, are you saying that courses in**
11:19:37 **pathology and pharmacology were the only courses you**
11:19:41 **took through Antigua?**
11:19:43 A. No. I did not testify to that.
11:19:47 **Q. Okay. What I'm trying to find out is other**
11:19:50 **than the courses you got credit for for**
11:19:54 **transferring, what actual academic courses did you**
11:19:59 **take through the medical school in Antigua?**
11:20:06 A. Aside from the answer I've already given
11:20:09 you?
11:20:09 **Q. Total. What courses?**
11:20:12 A. I don't recall. I know two of the courses
11:20:14 were pathology and pharmacology. I don't recall

what the other courses were.

Q. While you were enrolled in the medical school in Antigua but did not actually go there, did you do clinical work?

A. I don't understand the question in the context of the way you asked it. You said I did not actually go there. Is that part of the question? I don't understand that as a predicate.

Q. Did you ever go to Antigua as part of your medical school attendance at that school?

A. I think I've already answered that question, have I not?

Q. Dr. Freeman, if you've already answered the question, which is no, then how is it you do not understand my question asking you about your school work even though you weren't on site there?

MS. MACHLER: Object to the form.

THE WITNESS: I've already answered the question as to where I did my clinical rotations. I said they were done in the United States. So I don't understand a question that includes "you weren't there. Where were your rotations done?" Is it a question that I answered and said that it was in the United States or not? I'm just having a hard time with your questions.

11:21:46 **Q. BY MS. MONIZ: This is difficult for you,**
11:21:48 **Dr. Freeman, even after testifying in 1,100 to 1,200**
11:21:52 **depositions?**
11:21:54 A. I'm not responsible for the questions that
11:21:55 I'm being asked. If the question's a question that
11:21:59 I can't answer the way I would normally answer a
11:22:02 question and I've been asked not to give any
11:22:05 additional information in my responses that are
11:22:09 nonresponsive, then I'm just going to respond as
11:22:11 best as I can. If I don't understand the question,
11:22:14 I'm not going to answer it. That is a basic rule of
11:22:18 deposition testimony as far as I understand it.
11:22:20 Maybe you have different rules.
11:22:24 **Q. So Dr. Freeman, you've indicated you did**
11:22:29 **about six months of academic work which included,**
11:22:35 **among other things, pathology and pharmacology with**
11:22:38 **the University of Antigua. Correct?**
11:22:43 A. Not quite.
11:22:45 **Q. The medical school in Antigua?**
11:22:48 A. Correct.
11:22:51 **Q. After that did you do some clinical work**
11:22:54 **while enrolled in the medical school in Antigua?**
11:22:58 A. I did.
11:23:00 **Q. Where did you do that clinical work?**
11:23:03 A. Almost all of it was in Oregon and some of

it was in New York.

Q. What rotations did you do in Oregon?

A. I know I did differential diagnosis, family practice, internal medicine, surgery. I did specialty rotations in radiology, orthopedics, and neurosurgery and pediatrics. And I can't remember the other ones that I did.

Q. What clinical rotations did you do in New York?

A. Neurosurgery.

Q. Did you ever do a clinical rotation in obstetrics?

A. No. Outside of my chiropractic training, I did not.

Q. Did you deliver babies as a chiropractor?

A. I was trained to. It's part of the Practice Act in Oregon. But no, I did not actually hands-on deliver any babies.

Q. Did you deliver babies at any time during your clinical rotations with the medical school at Antigua?

A. Oh, goodness, no. I've never delivered a baby, thank goodness.

Q. Did you ever care for a child with a brachial plexus injury in any clinical setting?

11:24:35 A. No. I -- well, a child? I mean, I've
11:24:41 certainly seen numerous brachial plexus injuries.
11:24:44 I'm trying to think if any of them were pediatric.
11:24:50 I don't recall ever having been involved in care of
11:24:53 a kid with a brachial plexus injury, so I'm going to
11:24:57 say most likely not.
11:25:11 **Q. What was the total time you spent doing**
11:25:14 **clinicals in the United States while enrolled at the**
11:25:21 **medical school in Antigua?**
11:25:24 A. Somewhere around three years. I did about
11:25:27 an average of 20 or 25 hours per week over most of
11:25:30 that time.
11:25:42 **Q. Was that considered a full-time load?**
11:25:45 A. I don't know.
11:25:54 **Q. And then you quit going to the medical**
11:25:57 **school in Antigua before getting a degree. Correct?**
11:26:02 A. I withdrew from the program. That is
11:26:05 correct.
11:26:18 **Q. Did you ever go to Antigua at all in**
11:26:21 **connection with your medical school attendance**
11:26:25 **there?**
11:26:25 A. No. I withdrew before that requirement
11:26:28 came up.
11:26:29 **Q. If you had stayed enrolled in the medical**
11:26:32 **school, would you have had to go to Antigua?**

11:26:35 A. Yes.

11:26:36 **Q. For how long?**

11:26:38 A. I do not recall anymore.

11:26:47 **Q. Doctor, did you ever treat birth-injured babies?**

11:26:51 A. No. I mean, other than by happenstance. But I never really had much of a pediatric practice going back over a quarter of a century now. That was actually part of what I did clinically. I just can't think of any kiddos that I ever saw who had an injury. Well, maybe. I don't know. I saw thousands of patients over those 12 years, so it's possible.

11:27:18 **Q. But as you sit here today, you don't remember ever treating a child with a brachial plexus injury from birth. Is that correct?**

11:27:27 A. I don't. Nor do I have any opinions anywhere near that topic in this case.

11:27:40 **Q. And you dropped out of medical school in 2002?**

11:27:44 A. I withdrew from medical school in 2002. That's correct.

11:27:49 **Q. And when did you start your expert witness work?**

11:27:56 A. Probably 1998 to some degree.

11:28:00 **Q. So you started your expert witness work**
11:28:04 **even before you graduated -- or before you attended**
11:28:07 **medical school and then dropped out?**
11:28:12 A. I'm not going to answer it the way you're
11:28:15 characterizing it because you are using the term
11:28:20 "dropped out." I'm using the term "withdrew."
11:28:23 Dropped out is like I was not accomplishing any kind
11:28:27 of goals, which I was meeting all the goals at the
11:28:31 school, and I was the class representative at the
11:28:34 school, was in good standing. So I withdrew for my
11:28:38 own reasons. I'd have to explain. But if you keep
11:28:41 asking me questions and use the term "dropped out,"
11:28:44 I will not be able to answer them because it
11:28:47 mischaracterizes what I've said.
11:28:48 **Q. What percent of your income is currently**
11:28:50 **derived from working as an expert witness?**
11:29:02 A. I don't think I can answer the question the
11:29:04 way you've asked it.
11:29:06 **Q. Why not?**
11:29:06 A. Working as an expert witness is one of the
11:29:09 parts of what I do in my forensic practice, but it's
11:29:12 not the totality of what I do in my forensic
11:29:15 practice and I don't actually break down my witness
11:29:19 work versus my analytical work and separate out what
11:29:23 the values are.

11:29:30 **Q. What percentage of your income is derived**
11:29:34 **from your forensic work?**
11:29:37 A. Over the last five years, averaged about
11:29:40 probably 80 to 85 percent.
11:29:49 **Q. What are your other sources of earned**
11:29:57 **income besides forensic work?**
11:30:02 A. I have an income as a tenured professor of
11:30:06 forensic medicine at Maastricht University, and then
11:30:08 I have unrelated business income that makes up the
11:30:11 remainder.
11:30:13 **Q. Is your business income earned income or**
11:30:17 **investment income?**
11:30:24 A. I'm not sure if I understand the difference
11:30:25 well enough to be able to answer that question.
11:30:32 **Q. So what is your business income?**
11:30:35 A. Oh, it's a variety of unrelated business
11:30:39 ventures. Typically something like real estate.
11:30:48 **Q. And do you get a salary for that business,**
11:30:49 **or is it a matter of rents, royalties, interest,**
11:30:59 **that sort of thing?**
11:31:01 A. No.
11:31:05 **Q. That was a one-or-the-other question, not a**
11:31:09 **yes-or-no question. Is it earned income?**
11:31:16 A. No.
11:31:18 **Q. Okay.**

A. I don't think -- my understanding of what that term means, I don't think that's correct.

Q. So of your earned income, money that is actually paid to you for your work as opposed to your, say, property interest, other than your professorship at Maastricht University and your forensic work, what other earned income do you have?

A. Royalties from textbooks.

Q. Anything else?

A. No. That's the majority of it.

Q. So when you say 80 to 85 percent of your income is forensic, are you including in that total 100 percent your real estate income?

A. Well, I said business, various business ventures, but primarily consisting of real estate. Like selling a piece of real estate becomes part of the income. So yeah, all -- everything other than what I'm doing in forensic is within that 15 percent that comes to me that would show up in some sort of form of income.

Q. Okay. So for your taxes, do you need to differentiate earned income from something like selling real estate?

A. I couldn't even tell you about my taxes. I have no idea. I don't prepare them and I have no

expertise on that topic.

Q. So of income, earned income that you actually work to get, there's your forensic income and your professorship at Maastricht University in Sweden. Correct?

A. No.

Q. Where is Maastricht University?

A. The Netherlands.

Q. Are those the only sources then of earned income, your forensic work and your professorship at Maastricht University?

A. Well, I think I explained that there's other income. I don't know what you mean by "earned income." I mean, if I have a venture that sells and that becomes income, how -- I just don't understand your differentiation.

Q. So you don't understand how the IRS differentiates earned income from investment income?

A. No. I don't understand how you're differentiating.

Q. Do you understand how the IRS differentiates it?

A. Are you asking me if I'm an expert in how the IRS describes various forms of income?

Q. Do we need to have the question read back?

11:34:28 A. I don't understand your question. That's
11:34:29 why I asked you another question.
11:34:31 **Q. My question is do you understand how the**
11:34:35 **IRS treats earned income and investment income as**
11:34:39 **two separate categories?**
11:34:44 MS. MACHLER: Object to the form.
11:34:46 THE WITNESS: I can't answer that. I mean, I
11:34:49 don't understand your predicate because I'm not an
11:34:52 expert in tax law or taxes and I already mentioned I
11:34:57 don't prepare my own taxes. I have an accountant
11:34:59 who does that. So that is something that I simply
11:35:02 can't answer because I don't have expertise in that
11:35:06 area.
11:35:07 **Q. BY MS. MONIZ: And you don't have any**
11:35:08 **understanding of the difference between those two**
11:35:11 **types of income?**
11:35:14 A. I don't know what you mean by it.
11:35:23 **Q. According to one of your prior deposition**
11:35:26 **transcripts back in 2016, you were earning**
11:35:30 **approximately 900,000 to $1 million a year doing**
11:35:35 **expert work. Is that still true?**
11:35:41 A. Probably.
11:35:44 **Q. Have you raised -- I think you said you've**
11:35:46 **raised your rates since then.**
11:35:54 A. Are you -- you think I said that or are you

asking me if I have raised my rates since that time? I didn't see that as a question.

Q. Have you raised your rates since 2016?

A. Yes, I believe I have.

Q. Are you working more, less, or about the same now in your forensic work since 2016?

A. I think my testimony rate is probably pretty close to that. Although the last couple of months have been pretty crazy. But if you average out the slowing down of testimony during COVID, probably comes out to about the same.

Q. So you figure roughly you make about $1 million a year in earned income from your forensic work?

A. I did not give that you estimate. No. I said that's probably around the correct amount-ish, average over the last five years.

Q. So over the last five years, you've made approximately $1 million a year on your forensic work?

A. I believe that's how the math would break down, yes.

Q. And with your work in civil forensic work, approximately what percent of your cases are for the plaintiff?

11:37:25 A. Approximately 85 percent.

11:37:29 **Q. And have you been retained by Ms. Machler**
11:37:32 **or her firm, Sim Osborn, prior to this?**

11:37:37 A. I have.

11:37:38 **Q. How many times?**

11:37:41 A. I don't know. I would say probably less
11:37:43 than five over the past four or five years. Maybe
11:37:51 it's a little bit more, but it doesn't feel like
11:37:54 it's more than that.

11:38:11 **Q. During what years were you licensed as a**
11:38:14 **chiropractor?**

11:38:15 A. From 1987 until today.

11:38:26 **Q. What do you need to do to keep up your**
11:38:29 **chiropractic license?**

11:38:32 A. I believe you have to give evidence of
11:38:34 continuing education and pay the fee.

11:38:40 **Q. You're not required to practice in order to**
11:38:42 **keep up your license?**

11:38:44 A. No.

11:38:46 **Q. And I think you indicated earlier you're**
11:38:51 **not basing any of your opinions that you plan to**
11:38:54 **give in this case on your chiropractic background.**
11:38:59 **Is that correct?**

11:39:01 A. I'm not sure that I did say that, but that
11:39:04 is a correct statement.

11:39:09 **Q. And you're not going to offer any medical**
11:39:12 **opinions in this case. Correct?**
11:39:15 A. It depends on what you consider medical
11:39:22 testimony. If you consider medical testimony only
11:39:27 related to standard of care, absolutely not. I'm
11:39:29 not a standard of care expert. I think we spent
11:39:31 enough time talking about the fact that I'm not such
11:39:34 an expert that that's fairly clear. If you consider
11:39:37 medical evidence to be testimony about
11:39:42 epidemiological studies about medical conditions,
11:39:45 then I will be giving such testimony.
11:39:48 So if you improperly conclude what I'm
11:39:53 talking about as not being medical, then I guess I
11:39:56 would agree with you. But epidemiology is actually
11:40:00 a medical discipline and really I'm going to be
11:40:04 talking mostly about epidemiology.
11:40:07 **Q. You're not planning to testify in this case**
11:40:09 **about standard of care. Correct?**
11:40:11 A. That's correct.
11:40:14 **Q. I asked you about deliveries. Have you**
11:40:17 **ever provided prenatal care to a patient?**
11:40:22 A. No. I mean, I've seen patients when I was
11:40:25 a chiropractor, when I was a medical student who
11:40:29 were pregnant, but I'm not providing them care. I
11:40:33 don't provide prenatal care or obstetrical care or

11:40:33 gynecologic exams or any of that sort of thing.
11:40:39 That's not ever what I've done.
11:40:41 **Q. And you've never been a licensed midwife?**
11:40:44 A. No, I have not.
11:40:45 **Q. And you've never been a licensed**
11:40:48 **obstetrician?**
11:40:50 A. No, I have not.
11:40:52 **Q. And you've not been a licensed pediatric**
11:40:55 **neurologist. Correct?**
11:40:56 A. Correct.
11:41:05 **Q. You do not have a degree in engineering, do**
11:41:07 **you?**
11:41:08 A. I have no degrees in engineering. That is
11:41:11 correct.
11:41:29 **Q. When were you first contacted in this case?**
11:41:39 A. It appears that the very first
11:41:43 documentation that I have is April 23, 2019.
11:41:51 **Q. And as I understand, based on Judge**
11:42:04 **Lawler's order, you're planning to discuss the**
11:42:08 **studies that were relied on by the defense experts.**
11:42:13 **Is that correct?**
11:42:14 A. I certainly will be discussing those
11:42:16 studies, yes.
11:42:22 **Q. Okay. Let's mark the Court's order Exhibit**
11:42:24 **2.**

11:42:36 THE COURT REPORTER: Ms. Moniz, I believe you reserved Exhibit 2 for his updated CV.

11:42:39 MS. MONIZ: Thank you for that reminder. We'll call this Exhibit 3.

11:42:45 (Whereupon Exhibit 3 was marked for identification by the Court Reporter.)

11:42:47 **Q. BY MS. MONIZ: Dr. Freeman, have you seen this order? And we can go ahead and scroll down to all three pages if you need to.**

11:42:54 A. I don't believe I have, no.

11:43:09 **Q. Doesn't look familiar to you?**

11:43:12 A. I see legal documents every day. I couldn't tell you if I have seen it for sure or if I haven't.

11:43:20 **Q. Are you aware, whether you've seen this order or not, whether Judge Lawler ruled on a limitation to your testimony that will be allowed in court?**

11:43:42 A. The way you expressed that question, I don't think I can answer it because I can't say that I know what the limitation is.

11:43:50 **Q. Have you ever had any discussions with Ms. Machler or anyone from her firm about the scope of your testimony as determined by the judge?**

11:44:00 A. Yes.

11:44:02 **Q. What was your discussion?**

11:44:05 A. That I would talk about the studies that

11:44:07 are being used by Dr. Scher, S-c-h-e-r, Dr. DeMott,

11:44:09 D-e-M-o-t-t, and Dr. Grimm, G-r-i-m-m.

11:44:21 **Q. Okay. Let's go ahead and take this down,**

11:44:28 **and we'll mark the next exhibit, your notes. And**

11:44:35 **that will be Exhibit 4, if I haven't lost count.**

11:44:45 (Whereupon Exhibit 4 was marked for

11:44:45 identification by the Court Reporter.)

11:44:46 **Q. BY MS. MONIZ: Now, originally we were**

11:44:47 **provided -- well, we've actually been provided I**

11:44:51 **think three versions of your notes. But this**

11:44:53 **version has 39 pages, which apparently you**

11:44:59 **supplemented just a few minutes before your**

11:45:02 **deposition today. Is that right?**

11:45:07 A. It seems like it was a compound question.

11:45:09 However, I did provide updated reports prior to my

11:45:15 deposition today.

11:45:16 **Q. How long prior to 11:00 o'clock did you**

11:45:18 **provide this 39-page note document to Ms. Machler?**

11:45:25 A. Within a half hour, I'd say.

11:45:33 **Q. And what portion of this document did you**

11:45:35 **add this morning?**

11:45:38 A. I added more studies that Dr. Scher cited

11:45:44 to.

11:45:44 **Q. Can you tell us which ones those were? And**
11:45:47 **we can scroll down if we need to, or I'm thinking**
11:45:51 **you may have a copy available to you there.**
11:45:54 A. I'm looking at my copy.
11:45:55 **Q. Okay. Which -- if you could show us which**
11:45:58 **studies or which page numbers you added since**
11:46:03 **yesterday.**
11:46:11 A. It begins on page 10, starting under
11:46:15 "Dr. Scher's Additional Literature."
11:46:18 **Q. Okay. All right. Let's start with page 10**
11:46:47 **of your notes where you've written here -- it looks**
11:46:51 **like in blue you've written "Neither of these are**
11:46:57 **like ZH." So are those your comments, the blue**
11:47:02 **writing?**
11:47:02 A. Yes. My comments are interspersed between
11:47:06 many of these articles.
11:47:10 **Q. So is the blue -- in this particular one on**
11:47:14 **page 10, are the blue font words your words?**
11:47:22 A. As well as the other words. As well as
11:47:27 pretty much almost all the words that aren't quotes.
11:47:31 **Q. So why are some comments in blue and some**
11:47:34 **in black or bold?**
11:47:37 A. That's the way it came out while I was
11:47:39 working on it. There was a whole ton of stuff to go
11:47:42 through, and I was just trying to highlight it so I

11:47:44 would see it when I went back through it.

11:47:47 **Q. So there's no significance to the blue**

11:47:50 **font? Or is there some particular reason you**

11:47:55 **highlighted those?**

11:47:57 A. There's no significance to the blue font

11:48:01 versus any of my other comments. It doesn't mean

11:48:04 one thing or another. It's just my comments.

11:48:07 **Q. So you just happened to put some in blue**

11:48:14 **font? Or was there some other purpose behind it?**

11:48:18 A. There was no purpose other than it's a

11:48:20 different color.

11:48:30 **Q. Well, regardless of whether there's any**

11:48:33 **purpose, what did you mean by these words, "neither**

11:48:36 **of these are like ZH"?**

11:48:45 A. ZH refers to the plaintiff. And "neither

11:48:49 of these" refers to the cases that were described in

11:49:00 the paper.

11:49:05 **Q. And why do you say the neonate's -- when**

11:49:08 **you have "neonate's posterior arm" bolded, why do**

11:49:13 **you say "neither of these are like ZH"?**

11:49:21 A. Well, neither of them have pan-plexus

11:49:24 avulsions.

11:49:34 **Q. Neither of the cases in the letter that**

11:49:37 **Dr. Ouzounian wrote in 1997?**

11:49:42 A. Have pan-plexus avulsions. Correct.

11:49:46 **Q. What sorts of nerve damage do they have?**

11:49:57 A. Well, they describe permanent brachial

11:50:00 plexus injuries. Although I'm not sure they were

11:50:02 all permanent.

11:50:04 **Q. So you think that even though the article**

11:50:07 **described permanent injuries, you don't believe that**

11:50:09 **they were all permanent?**

11:50:11 A. I would have to go back through the paper.

11:50:16 Hold on a second. I'd have to go back through the

11:50:27 letter to tell you. But my recollection is that the

11:50:29 cases were not all permanent.

11:50:37 **Q. Did the cases specify whether they were**

11:50:41 **anterior or posterior arm?**

11:50:43 A. Some of the cases did, yes.

11:50:46 **Q. In this Dr. Ouzounian article did they?**

11:50:51 A. In some of the cases, yes.

11:51:02 **Q. Most of the cases in the obstetric**

11:51:06 **literature that you looked at do not specify the**

11:51:11 **exact nature of the -- or extent of the damage but**

11:51:21 **only say that it's permanent. Correct?**

11:51:26 A. Some of the papers do. That's correct.

11:51:28 Some of the papers are -- there are a lot of papers.

11:51:32 So they're quite varied.

11:51:35 **Q. Did this paper specify the nature of the**

11:51:38 **permanent injury to the extent it was a permanent**

11:51:42 **injury?**

11:51:43 A. Just that was upper brachial plexus.

11:51:47 **Q. It did not specify which -- exactly which**
11:51:51 **nerves were damaged and whether they were avulsed or**
11:51:59 **whether there was a neuroma or whether there was a**
11:52:02 **rupture of the nerve itself?**

11:52:06 A. I don't have that noted. I'd have to pull
11:52:07 up the paper to be able to answer that question.

11:52:12 **Q. You don't remember as you sit here today**
11:52:14 **looking at your notes?**

11:52:16 A. Well, it's not in my notes and I've not
11:52:20 memorized the papers because there are dozens of
11:52:24 papers that I had to look over that I was just given
11:52:27 last week.

11:52:34 **Q. Let's scroll down to page 11. And let's**
11:52:53 **look at the whole image. This is -- looks like an**
11:53:00 **image that you pulled from the Lear article of 2018?**

11:53:08 A. Your question is does it look like that?

11:53:12 **Q. Where did you get this particular**
11:53:16 **illustration on page 11?**

11:53:20 A. I believe that's from the paper itself.

11:53:23 **Q. Okay. Let's scroll down to the next page.**
11:53:29 **Is this illustration also from that article?**

11:53:34 A. To the best of my recollection, yes.

11:53:37 **Q. Okay. Let's look at the next page.**

11:53:45 **Sorry. Back up. Below the last image.**

11:53:57 **Okay. Now under No. 4 there, you say "This**

11:54:01 **is unrelated to any issues for ZH." What do you**

11:54:06 **mean by that?**

11:54:09 A. Well, the defendant's experts have -- are

11:54:14 using these papers to illustrate that the kind of

11:54:22 injuries observed in ZH can result from ordinary

11:54:27 forces of labor and then make the fallacious

11:54:34 argument that that means that if you add traction to

11:54:39 the equation, that that doesn't increase the risk.

11:54:43 And so they're making a logical leap that isn't

11:54:49 supported by any of this literature. So none of

11:54:51 this information that we've gone over in any way

11:54:53 supports the idea that adding traction to a

11:54:58 difficult labor or a maneuver to a difficult labor

11:55:02 is going to produce -- is not going to produce or

11:55:06 make more likely an injury to the brachial plexus,

11:55:08 either anterior or posterior. None of this

11:55:12 literature supports that.

11:55:17 **Q. So in your opinion, none of the literature**

11:55:22 **you've cited that has been referenced in one way or**

11:55:28 **another by the defense experts in this 39-page**

11:55:33 **overview applies to this case?**

11:55:38 A. No.

11:55:39 **Q. Is that your testimony?**

11:55:40 A. That is not my testimony.

11:55:52 **Q. So going back to this No. 4, "unrelated to any issues for ZH," this article is about peripheral chemoreflex in the birth process. And your testimony is that this doesn't apply because it doesn't address the issue of traction with the natural forces of labor?**

11:56:26 A. It doesn't in any way demonstrate that adding traction to the ordinary forces or normal forces of labor does not also increase the risk of a traction-related injury, such as any brachial plexus injury of any severity or that a more severe injury and complete avulsion is not made even more likely with the addition of traction.

11:56:55 **Q. So but this particular article isn't addressing that whole question of traction, is it?**

11:57:04 A. Precisely.

11:57:05 **Q. Or the natural forces?**

11:57:08 A. One has to ask why it's included in Dr. Scher's reference materials as support for his opinion.

11:57:14 **Q. Well, what do you understand about Dr. Scher's opinion in this case?**

11:57:25 A. Well, I described Dr. Scher's opinions in my notes. I can tell you what I have. I'm not

11:57:30 going to get into all of his opinions because I'm
11:57:33 only addressing his opinions that relate to the
11:57:37 literature.
11:57:41 **Q. Well, Dr. Scher didn't say that in no**
11:57:48 **circumstances could traction added to the natural**
11:57:52 **forces cause injury, did he?**
11:58:00 A. No, he did not say that.
11:58:03 **Q. What is your understanding of his reference**
11:58:05 **to the chemoreflex activation during labor that's**
11:58:11 **illustrated by this article?**
11:58:17 A. It goes to a hypothetical explanation that
11:58:21 hypotonia is in some way related to the risk of
11:58:24 injury when there is a dystocia or without a
11:58:29 dystocia because of an article that found a
11:58:32 50 percent increased risk of hypotonia in brachial
11:58:36 plexus cases.
11:58:40 **Q. So you believe that the statement that**
11:58:47 **hypotonia increases the risk of injury to the**
11:58:51 **brachial plexus is a false one?**
11:58:54 A. Oh, most certainly is. It's a case of
11:58:56 reverse causation. The brachial plexus injury
11:59:01 causes the hypotonia. There is no evidence
11:59:04 whatsoever that an intrapartum hypotonia contributes
11:59:08 to the risk of this injury. That's --
11:59:13 **Q. So if an expert said that the presence of**

11:59:17 **hypotonia would increase the risk of brachial plexus**
11:59:23 **injury occurring in the course of birth, you would**
11:59:26 **disagree with that?**
11:59:27 A. If that expert says "I have an
11:59:28 epidemiologic study of national crash" -- or excuse
11:59:31 me -- "national birth data or a large epidemiologic
11:59:37 data set, and it tells me that hypotonia is a cause
11:59:42 of brachial plexus or a risk factor in brachial
11:59:45 plexus injury," I would say no, that's a
11:59:48 misinterpretation of what the data show. What the
11:59:52 data show is that hypotonia is never evaluated
11:59:52 intrapartum. It's always postpartum and that
11:59:55 hypotonia is a feature of a brachial plexus injury
11:59:59 so that a reverse causation scenario is set up and
12:00:03 it's an incorrect epidemiologic inference. Knowing
12:00:08 about pediatric neurology in no way is the
12:00:14 appropriate way to interpret an epidemiologic study,
12:00:18 particularly when there are issues of causality and
12:00:21 temporal order that have to be also evaluated, which
12:00:24 requires expertise in epidemiology.
12:00:30 **Q. Well, you're the only expert in this case**
12:00:32 **who claims to have expertise in epidemiology. Isn't**
12:00:38 **that correct?**
12:00:39 A. I don't know what you mean by "claims." I
12:00:41 have a master's degree and a Ph.D. in epidemiology

and have been a professor of epidemiology for 25 years. And I've also received a United States Fulbright scholarship concerning my application of epidemiology to forensic medicine from the U.S. Department of State.

There doesn't seem to be any issue of claiming that I am an epidemiologist. There doesn't seem to be any issue as to what epidemiology is. So if you're asking me if I'm the only expert who is a trained epidemiologist in this case, I would agree that that's probably true.

Q. And which, if any, of the other experts in this case for plaintiffs or defense are basing their opinions purely on epidemiology?

A. Well, the three experts that I'm referring to here are using the literature to draw epidemiologic conclusions of the frequency of injuries that result from traction versus forces of labor, and the information that they're using to support that actually does not support it. And, in fact, in one case, one of the papers cited by -- I'm not sure if it's Dr. DeMott or Dr. Scher actually shows that traction increases the risk of brachial plexus injury.

Q. Which article is that?

12:02:02 A. I'd have to go back through my notes to be
12:02:05 able to answer that question. It's 39 pages of it.
12:02:42 **Q. So let's look at your point No. 5 here**
12:02:46 **under Johnson 2010 "Neuroanatomy of the BP." You**
12:02:52 **comment does not -- "contains neither the word**
12:02:59 **'injury' nor 'palsy.'" Is that correct?**
12:03:06 A. That the study contains neither the word
12:03:09 "injury" or "palsy" or that --
12:03:12 **Q. Is that your comment?**
12:03:13 A. That is my comment.
12:03:14 **Q. And are you saying unrelated to ZH because**
12:03:17 **it doesn't have those words in it?**
12:03:19 A. No. Unrelated to ZH because there's no
12:03:24 evidence that ZH has any abnormality of the brachial
12:03:26 plexus or that any such abnormality despite the
12:03:31 epidemiologic evidence of the rate of occurrence in
12:03:34 the general population that that abnormality in any
12:03:38 way played a role in causing ZH's pan-plexus
12:03:42 avulsion.
12:03:45 **Q. What percent of brachial plexus in this**
12:03:53 **study were variant?**
12:03:57 A. I'd have to go in and open the study up. I
12:04:00 didn't put it in my notes.
12:04:02 **Q. Would that be important?**
12:04:04 A. Not in the least bit. I already know what

12:04:07 the variant rate is.

12:04:10 **Q. What is the variant rate of the anatomy of**

12:04:15 **brachial plexus?**

12:04:15 A. Between 30 and 50 percent, approximately.

12:04:18 But they're all based on cadaver studies, so some of

12:04:21 the cadaver studies -- well, all of the cadaver

12:04:26 studies of babies are children that died for one

12:04:29 reason or another. So it's not necessarily

12:04:30 representative of the general population of survived

12:04:33 children.

12:04:48 **Q. Did you read Dr. Scher's deposition except**

12:04:52 **to pull out these references?**

12:04:57 A. Yes, I did.

12:05:02 **Q. And so No. 6, you don't know why he**

12:05:05 **included that article?**

12:05:08 A. Yes. It's completely unclear. It

12:05:16 certainly in no way supports any of his opinions as

12:05:21 to the cause of the brachial plexus injury in this

12:05:23 child.

12:05:24 **Q. Well, do you understand his opinion went**

12:05:26 **beyond what caused it?**

12:05:29 A. I'm only looking at the issues with regard

12:05:31 to causation as they're being -- the bad opinion

12:05:35 being given by all three experts.

12:05:40 **Q. All right. Let's scroll down again. And**

12:05:54 **maybe go up. It looks like reference 7. This is**
12:06:04 **Jennett 2002 "Erbs palsy contrasted with Klumpke's**
12:06:12 **and total palsy." Is that the article?**
12:06:18 A. It was the Jennett 2002 paper. Correct.
12:06:22 **Q. And that was a cadaver study?**
12:06:25 A. Correct.
12:06:34 **Q. And let's scroll down a little bit, please.**
12:06:38 A. Excuse me. At least of infants.
12:06:41 **Q. Okay. Now, these case reports, are these**
12:07:05 **different articles or this is all still part of that**
12:07:06 **study?**
12:07:06 A. These are all case reports within Jennett.
12:07:37 **Q. Okay. Go ahead and scroll down, please.**
12:07:41 A. We've been going for about an hour. When
12:07:43 you -- a little more than an hour. When you find
12:07:47 it's a good time for a break, would you mind if I
12:07:50 got up and got some water?
12:07:52 **Q. Happy to take a break in just a minute**
12:07:55 **here.**
12:07:56 **Your comment under here is "Unclear from**
12:07:58 **paper whether traction used in cases, unrelated to**
12:08:05 **ZH."**
12:08:14 A. Is there a question?
12:08:16 **Q. Is that your comment?**
12:08:18 A. That was my comment, yes. I wrote that.

That was not from a paper.

Q. And did you have any other comments about those cases?

A. No. They in no way demonstrate that adding traction doesn't increase risk.

Q. Do they demonstrate that the natural courses of labor cause injury to babies?

A. They demonstrate that the natural forces of labor can cause injuries in babies. But they also demonstrate that the injuries are quite rare, that permanent injuries are even more rare, and that avulsion injuries, particularly avulsion injuries of the entire plexus, are incredibly rare. So then the injury is not explained by the ordinary forces of labor in that it's so incredibly rare, ordinary forces of labor are not the sole explanation for the injury in the absence of the traction.

Q. But isn't that a conclusion without a basis that you're making based simply on the fact that these things don't happen often?

MS. MACHLER: Object to the form.

THE WITNESS: I'm not drawing a conclusion. I'm making a statement. The statement is they're rare. The injuries are incredibly rare, and the injury that this child has is very, very rare. And every

12:09:53 expert seems to agree on that. So nobody seems to
12:09:55 be in disagreement about the epidemiologic risk of
12:09:56 this injury, yet we're talking about ordinary
12:10:00 conditions such as abnormality that might be present
12:10:03 of the brachial plexus or ordinary forces of labor
12:10:07 or some sort of hypotonic response, all which occur
12:10:12 in vaginal deliveries and 99.999-plus percent of
12:10:20 which don't result of in this injury. So --
12:10:23 **Q. BY MS. MONIZ: So rare things still happen.**
12:10:25 **Right?**
12:10:26 A. So rare things do happen, but they don't
12:10:29 become less likely to happen or more likely to
12:10:31 happen if you add something that is a known risk
12:10:34 factor for the injury on its own, which is adding
12:10:37 traction. If you add traction, the injury becomes
12:10:41 more likely. And so ignoring a major risk factor
12:10:46 for the injury and pointing to other factors that
12:10:49 are present in births where the injury doesn't
12:10:52 happen is not a good explanation for the injury
12:10:56 based on what this literature shows. This
12:10:58 literature doesn't support the way these experts are
12:11:03 characterizing forces of labor as an explanation, an
12:11:08 entire explanation for this child's injury.
12:11:12 **Q. Let's go ahead and take a break.**
12:11:14 A. Okay. About five minutes okay? I'm just

12:11:20 going to run down and --

12:11:22 **Q. Sure.**

12:11:24 THE VIDEOGRAPHER: The time is 12:11 P.M. We're

12:11:27 off the record.

12:11:28 (Recess.)

12:19:23 THE VIDEOGRAPHER: The time is 12:19 P.M. We're

12:19:25 back on the record.

12:19:28 **Q. BY MS. MONIZ: So Dr. Freeman, do you agree**

12:19:31 **that the natural forces of labor are capable of**

12:19:35 **causing an injury to the brachial plexus in the**

12:19:39 **newborn?**

12:19:40 A. Yes.

12:19:46 **Q. And what is the basis of your opinion in**

12:19:49 **regard to traction?**

12:19:54 A. Well, it's a study of 380,000 births that

12:19:58 was published in 2018 that shows that when you

12:20:02 control for all other factors, traction adds at

12:20:06 least three times the risk of brachial plexus

12:20:09 injury. That is also contained in one of the papers

12:20:13 cited by one of the experts. And if you like, I can

12:20:16 pull that up so I can tell you which expert that is.

12:20:25 Hold on just a minute if you would, please.

12:20:33 I believe it's DeFrancesco from 2019, a

12:20:37 paper called "The Epidemiology of Brachial Plexus

12:20:40 Birth Palsy in the U.S. Declining Incidents and

12:20:45 Evolving Risk Factors." And that is capital D-e,
12:20:48 capital F-r-a-n-c-e-s-c-o.
12:20:55 **Q. Any other basis for your opinion?**
12:20:57 A. Yes. There's a paper called -- hold on
12:21:04 just a minute here. A paper called "A Multistate
12:21:25 Population-Based Analysis of Linked Maternal and
12:21:28 Neonatal Discharge Records to Identify Risk Factors
12:21:32 for Neonatal Brachial Plexus Injury." And that
12:21:35 paper is from -- sorry. That's from 2016. I was
12:21:41 thinking it was 2018 for some reason.
12:21:43 **Q. And who is the author on that paper?**
12:21:46 A. Actually it's dated 2017. It was submitted
12:21:48 in 2016.
12:21:50 Let's see. Oh, that's me. Freeman,
12:21:51 Goodyear, and Leith are the authors.
12:21:56 **Q. Now, that wasn't on the list of studies**
12:21:59 **referenced by the defense experts, was it?**
12:22:03 A. No. They certainly cherry picked their
12:22:06 articles and did not include this one.
12:22:19 **Q. What journal was that in?**
12:22:27 A. The International -- hold on just a minute
12:22:34 here. The International Journal of Gynecology and
12:22:40 Obstetrics, which is the official journal of the
12:22:44 International Federation of Gynecology and
12:22:47 Obstetrics.

12:22:52 **Q. Where is that based?**

12:22:56 A. Where is the International Federation of

12:22:58 Gynecology and Obstetrics based?

12:23:03 **Q. Yeah.**

12:23:03 A. I haven't the faintest idea.

12:23:06 **Q. And is that a peer-reviewed journal?**

12:23:09 A. It's a highly ranked peer-reviewed journal

12:23:12 in obstetrics and gynecology.

12:23:13 **Q. Highly ranked by whom?**

12:23:15 A. By the people who do those rankings. It

12:23:18 has a high impact factor relative to other OB/GYN

12:23:24 journals.

12:23:25 **Q. But you don't know who ranks these**

12:23:28 **journals?**

12:23:29 A. Well, they're -- yes, I do. It's the

12:23:32 National Library of Medicine through their PubMed

12:23:35 system. Yes, of course I do. There's hundreds of

12:23:39 publications through that clearinghouse of

12:23:40 information.

12:23:59 **Q. Let's go back to I think what we've marked**

12:24:03 **Exhibit 4, your notes.**

12:24:09 A. All right.

12:24:15 **Q. So in this one on page 13 that we were**

12:24:20 **discussing, I think you agreed that it was unclear**

12:24:25 **whether traction was used, and for that reason you**

12:24:28 **couldn't relate it to this case. Is that right?**

12:24:36 A. No, no. I can't relate it -- it's not
12:24:39 whether it's related to this case. It's whether
12:24:42 it's related to the opinion by all three defense
12:24:44 experts, which is that forces of labor completely
12:24:47 explain this injury and the traction doesn't add to
12:24:50 it, that there's no evidence of traction adding to
12:24:53 it, whereas there is good evidence of traction
12:24:56 adding to it, and traction as a cause of brachial
12:24:58 plexus injuries is not an unproven theory, as
12:25:01 Dr. DeMott claims, but is actually well-accepted and
12:25:07 well-proven through the epidemiologic studies cited
12:25:10 by Dr. Scher, for example. I think even Dr. Grimm
12:25:16 acknowledges that.

12:25:26 **Q. So you as well as other people testifying**
12:25:35 **as experts in this case agree that the natural**
12:25:38 **forces of labor alone could generally cause a**
12:25:43 **brachial plexus injury and that traction alone could**
12:25:48 **cause a brachial plexus injury. Right?**

12:25:52 MS. MACHLER: Object to the form.

12:26:02 THE WITNESS: It sounds like you asked me to
12:26:04 characterize what other experts are saying, and I
12:26:06 can't do that because I don't -- I can't tell you
12:26:09 exactly what other experts are saying. But I can
12:26:14 tell you what my opinion is on the question you

asked me.

Q. BY MS. MONIZ: Have you read the depositions of the other experts in this case?

A. Not -- I don't know if I've even gotten all of them. Let me just double-check here. I'm not opining about their opinions. I'm opining specifically about the things that are in the judge's order, which is the literature cited by the defense experts.

You know, I don't actually see the depositions of the other experts in the materials I'm looking at, so I don't really -- I don't think that I actually have seen those depositions, to answer your question.

Q. Why don't you tell us then what materials you have reviewed in addition to the studies that are listed in this Exhibit 4.

A. Well, I've reviewed the depositions of Dr. DeMott and the deposition of Dr. Grimm and the deposition of Dr. Scher. I've reviewed the disclosure of the defendant's experts' opinions. I have reviewed a declaration by Dr. DeMott. I've reviewed medical records from Children's Hospital, from Providence for ZH, and then records from Ms. Hamilton and records from Valley View Plastic

12:28:25 Surgery. I think that's the entirety of my file.

12:28:30 **Q. So other than the depositions of Dr. Scher,**

12:28:34 **Dr. DeMott, and Dr. Grimm, you've not reviewed any**

12:28:37 **other depositions. Is that correct?**

12:28:40 A. That's correct.

12:28:42 **Q. Okay. And these studies that are discussed**

12:28:49 **in Exhibit 4 were provided to you by Ms. Machler or**

12:28:56 **her office?**

12:29:06 A. Good question. I think that is correct. I

12:29:09 think they were supplied by the defendant's experts

12:29:13 and then I got them via that route.

12:29:15 **Q. Okay.**

12:29:16 A. I don't think I had to go out and get any,

12:29:20 but I'm not 100 percent sure about that.

12:29:22 **Q. All right. Let's look at this No. 8, the**

12:29:30 **Iskender article.**

12:29:34 A. I apologize. I have to revise what I was

12:29:37 saying. I'm looking through all of my files, and I

12:29:40 do have files from June of 2019 that include a

12:29:48 deposition from Annette Hamilton Bleuler,

12:29:53 B-l-e-u-l-e-r. I apologize for overlooking that.

12:30:02 And then there's some exhibits with that. I did not

12:30:09 rely on any of those in forming my opinions,

12:30:13 however.

12:30:18 **Q. Any other depositions besides the three**

12:30:23 **defense experts and Ms. Bleuler?**

12:30:26 A. Yeah, I just want to make sure I'm not

12:30:29 overlooking anything again. No. I do not see any

12:30:37 other depositions.

12:30:52 **Q. On this comment about Iskender, there's a**

12:30:59 **bolded statement there:**

12:31:01 **"We were enable to provide data**

12:31:03 **regarding the involvement of the posterior**

12:31:06 **shoulder."**

12:31:07 **That's a bolded portion of the quote in the**

12:31:12 **article. Is that right?**

12:31:15 A. It's a bolded portion of a quote from the

12:31:19 article in my notes actually.

12:31:22 **Q. So you're simply highlighting what was in**

12:31:28 **the study, not making an additional comment yourself**

12:31:33 **here?**

12:31:33 A. Correct. The quotation mark tells you that

12:31:36 it's from the study and not my own comment.

12:31:39 **Q. And so their records didn't show whether it**

12:31:45 **was an anterior or posterior shoulder that was**

12:31:48 **injured. Correct?**

12:31:50 A. Correct.

12:31:50 **Q. And that happens in a number of these**

12:31:54 **studies. Right? That they don't differentiate?**

12:31:59 A. Between anterior and posterior, yes, that

12:32:01 is correct.

12:32:05 **Q. Let's scroll down and look at the Hoffman**
12:32:07 **article that you listed as No. 9. You bolded**
12:32:17 **another sentence there which also looks like a**
12:32:22 **quote.**

12:32:23 **"The total number of maneuvers**
12:32:25 **performed significantly correlated with the**
12:32:28 **rate of neonatal injury."**
12:32:31 **Did I read that correctly?**

12:32:32 A. Yes.

12:32:50 **Q. Okay. Let's scroll down. When you say --**
12:33:00 **or when you highlight that the number of maneuvers**
12:33:05 **correlated, what does that mean to you?**

12:33:08 A. Well, it tells me that the more
12:33:17 manipulation of the fetus and the mother there is
12:33:21 during the delivery, that the risk of the brachial
12:33:26 plexus injury increases. Specifically brachial
12:33:30 plexus, although they talk about all neonatal
12:33:34 injuries.

12:33:39 So there's a couple of ways to interpret
12:33:42 that. One is the maneuvers are causing the injuries
12:33:42 and the other one is to say when the injuries are
12:33:42 more likely, that more maneuvers are needed. And
12:33:46 you can't draw a conclusion about either from this
12:33:50 study.

12:33:52 **Q. Well, in fact, the need for more maneuvers**
12:33:57 **would likely correlate to a more difficult shoulder**
12:34:01 **dystocia. Right?**
12:34:02 A. I agree.
12:34:04 **Q. And in this case the article lists neonatal**
12:34:08 **injuries. Not only two types of brachial plexus**
12:34:12 **palsy but a clavicular fracture, humerus fracture,**
12:34:20 **hypoxic ischemic encephalopathy, and death. Right?**
12:34:27 A. Right. There were no deaths, but they do
12:34:30 list the other injuries.
12:34:32 **Q. Yeah. And clavicular fracture can occur**
12:34:36 **from the natural forces of labor, based on these**
12:34:39 **studies. Right?**
12:34:40 A. There's more than just these studies that
12:34:43 support that, but yes, that is certainly true.
12:34:46 **Q. And a humerus fracture could occur from the**
12:34:49 **natural forces of labor. Right?**
12:34:53 A. Much less common, but it's possible, yes.
12:34:56 **Q. And, of course, hypoxic ischemic**
12:34:59 **encephalopathy can occur from the natural forces of**
12:35:06 **labor. Right?**
12:35:07 A. That's a little different. It can occur in
12:35:15 a birth where there are no maneuvers, where it is
12:35:18 unrelated to traction generally. It's a more
12:35:22 complicated issue, however.

12:35:26 **Q. And hypoxic ischemic encephalopathy can occur from a shoulder dystocia that's not successfully resolved in a timely way. Right?**

12:35:38 A. Yes, it can.

12:35:42 **Q. All right. Let's scroll down here. And this is No. 10, a 1995 case report. Now, that's highlighted. Did you do that highlighting?**

12:36:07 A. I did.

12:36:10 **Q. What's the reason?**

12:36:12 A. Well, it's a posterior brachial plexus injury.

12:36:17 **Q. And why is that significant?**

12:36:19 A. Because it's the issue of interest in this case.

12:36:42 **Q. And this, you've also highlighted "head delivered from the left occipital anterior position." Correct?**

12:36:52 A. Yes.

12:36:58 **Q. "On external rotation, the fetus was facing the mother's right side with the right shoulder in the anterior position." So the fetus was moved?**

12:37:08 A. It appears that there was rotation of the fetus.

12:37:12 **Q. 180 degrees?**

12:37:14 A. That's what it looks like, yes.
12:37:15 **Q. And it says:**
12:37:17 **"The combo of McRoberts and modest**
12:37:22 **in-line downward traction on the head**
12:37:25 **delivered the fetus"?**
12:37:27 A. Yes.
12:37:27 **Q. And why is this significant to this case?**
12:37:31 A. Well, we have traction that's described in
12:37:33 the description of the birth and we also have
12:37:39 manipulation of the fetus while in utero. So there
12:37:44 are certainly maneuvers that have been performed on
12:37:47 the fetus. But it doesn't really tell us much of
12:37:51 anything. There is just a posterior brachial plexus
12:37:54 injury that's described. It's not avulsion. It's
12:37:59 not a high-severity injury that's described. And
12:38:05 still there's not really good evidence that
12:38:07 avulsion -- complete avulsion injuries occur just
12:38:12 with spontaneous forces of labor.
12:38:17 **Q. Dr. Freeman, does this study say the nature**
12:38:20 **of the injury itself in terms of the anatomy?**
12:38:28 A. My recollection is -- well, it's not an
12:38:31 avulsion. And my recollection it might have been a
12:38:35 temporary brachial plexus injury, if I recall
12:38:38 correctly.
12:38:53 **Q. All right. Let's scroll down. And this --**

12:39:02 **talking about this same study, it says there was no**
12:39:08 **rotation of the fetus. So are we talking about the**
12:39:18 **same study?**
12:39:21 A. You have to go back up. I lost where you
12:39:24 were in my notes.
12:39:27 **Q. Okay. Let's scroll back up.**
12:39:32 A. Yes, same study.
12:39:47 **Q. Okay. Then it says that "At discharge,**
12:39:57 **infant had some minor movement of fingers." So do**
12:40:01 **we even know if this was a permanent or temporary**
12:40:05 **injury?**
12:40:07 A. As I said, my recollection of these was
12:40:09 that it was a temporary injury.
12:40:12 **Q. But those notes don't say that, do they?**
12:40:15 A. No. Just that the child had some minor
12:40:18 movement of the fingers. And we don't have
12:40:22 long-term neurological follow-up.
12:40:34 **Q. And in this case the authors say that there**
12:40:37 **was not any traction different than those exerted on**
12:40:43 **the head with any vaginal delivery. Right?**
12:40:47 A. They do say that.
12:40:55 **Q. All right. Let's scroll down. And before**
12:41:15 **we go -- let's go up. Sorry. Page 17 there. Now,**
12:41:32 **you've, it looks like, red-circled this table 3. Is**
12:41:40 **that right?**

12:41:44 A. I put a bold red outline on it. That's
12:41:48 correct.
12:41:55 **Q. And why is that?**
12:41:57 A. So I would see it and it would stand out.
12:42:00 **Q. And why is this table important?**
12:42:03 A. Well, it's important because it in no way
12:42:07 supports the defendant's experts' opinion,
12:42:10 particularly Dr. Scher, that adding traction to a --
12:42:16 to the forces of labor does not increase the risk
12:42:23 that the brachial plexus injury is going to occur
12:42:27 and does not in any way describe the kind of
12:42:33 circumstances under which ZH's injuries can and do
12:42:38 occur.
12:42:40 **Q. This table doesn't support your view that**
12:42:44 **traction adds to the natural forces of labor either,**
12:42:49 **does it?**
12:42:50 A. It doesn't examine it.
12:42:53 **Q. It does, however, talk about babies**
12:42:59 **experiencing clavicular fractures and humeral**
12:43:05 **fractures in addition to brachial plexus injuries.**
12:43:07 **Correct?**
12:43:10 A. Humeral fractures, rarely, but more
12:43:14 clavicular fractures, that is correct.
12:43:17 **Q. Okay. All right. Let's scroll down here.**
12:43:33 **Let's back up -- sorry, May. But yeah, right there**

12:43:37 **at the bottom of this page 17. There's a quote here**
12:43:46 **under the conclusions also outlined in red.**
12:43:51 **"Direct fetal manipulation techniques**
12:43:54 **used to alleviate shoulder dystocia are not**
12:43:58 **associated with an increased rate of bone**
12:44:01 **fracture or brachial plexus injury."**
12:44:03 **Did I read that correctly?**
12:44:06 A. Yes.
12:44:08 **Q. And do you agree with that conclusion of**
12:44:13 **that article?**
12:44:14 A. Well, they're contradicted by the article
12:44:17 that's cited in the preceding pages that show that
12:44:20 the more maneuvers, the more likely there is going
12:44:24 to be a brachial plexus injury. So it's consistent
12:44:28 with what later research demonstrated on a larger
12:44:32 study sample.
12:44:33 **Q. Well, isn't this the conclusion of the same**
12:44:37 **study that we were just talking about?**
12:44:40 A. No. This is a different study.
12:44:43 **Q. What study is this?**
12:44:45 A. If you want to go up, we can go back and
12:44:53 look at it. Give me just a minute. I'm going to
12:44:56 look at my copy, if that's okay.
12:44:58 This is Gherman. And it is the paper by
12:45:08 Hoffman in 2011, which is a much later study with a

very large sample, 132,000 women or live births, as opposed to the study of looks like -- hold on just a minute here -- a study of 285 cases of shoulder dystocia.

Q. So you're explaining that the epidemiology study that you co-authored comes to a different conclusion than Dr. Gherman's 1997 study by a board-certified obstetrician. Is that right?

A. My last name is not Hoffman. I did not write that paper in 2011.

Q. We're talking about a Dr. Gherman's study from 1997 and the conclusion that you read highlighted on the next page.

First of all, is that -- no, no. May, back to 17. Bottom of 17 where it says "Conclusions."

"Direct fetal manipulation techniques used to alleviate shoulder dystocia are not associated with an increased rate of bone fracture or brachial plexus injury."

You agree that that was the conclusion by Dr. Gherman based on the data that he published in his article. Correct?

A. I don't know who wrote that statement, but it is the conclusion by the authors.

Q. And that's consistent with the data set

12:47:13 **forth in that study?**

12:47:17 A. I haven't examined the data to tell you
12:47:20 whether or not the epidemiologic conclusion that was
12:47:23 drawn by the author, regardless of what his
12:47:25 background or training is, is consistent with the
12:47:28 data. I've not attempted to reanalyze it.
12:47:32 The purpose of my analysis in this case is
12:47:33 to evaluate the literature that had been cited by
12:47:38 the defense experts. In this case Dr. Scher has
12:47:40 cited to a paper that says the completely opposite
12:47:43 of one of the other papers he cited to. The other
12:47:45 paper he cited to a 2011 paper, and that is by
12:47:49 Hoffman. And that is 132,000 births with nearly ten
12:47:55 times the number of shoulder dystocias. As the
12:48:05 Gherman paper, I should say. And Gherman, by the
12:48:08 way, is G-h-e-r-m-a-n.

12:48:13 **Q. Go ahead and scroll down, May, please, to**
12:48:16 **the next page.**
12:48:19 **Now, here I think this page 18 then would**
12:48:23 **mark the end of your additional Dr. Scher comments,**
12:48:27 **the notes that you added this morning. Is that**
12:48:30 **correct?**

12:48:39 A. Yes. They go from whatever that page was
12:48:42 to the beginning of Dr. DeMott's opinions or use of
12:48:47 literature.

12:48:58 **Q. Looking at this page 18, you appear to**
12:49:03 **summarize Dr. DeMott's opinion. In terms of -- is**
12:49:12 **that correct?**
12:49:13 A. Some of his opinions, yes.
12:49:16 **Q. And you indicate "Brachial plexus injuries**
12:49:19 **in the posterior arm are more likely to be**
12:49:23 **permanent." Is that what it says here?**
12:49:25 A. Yes.
12:49:27 **Q. Do you agree with that?**
12:49:31 A. I've never seen any evidence that's true,
12:49:33 that is, in any of the scientific literature. But
12:49:37 if that's Dr. DeMott's experience, I'm not going to
12:49:41 comment on his experience.
12:49:42 **Q. So you don't either agree or disagree with**
12:49:47 **that?**
12:49:47 A. No, I don't agree or disagree. Although,
12:49:51 again, the problem with Dr. DeMott, if he's basing
12:49:54 it on his experience, is that he also says he hasn't
12:49:58 had any brachial plexus injuries in his births, so
12:50:00 I'm not sure where that comes from. I wasn't able
12:50:02 to find any support for the frequency of permanency
12:50:05 of posterior arm brachial plexus injuries in the
12:50:08 literature cited by Dr. DeMott.
12:50:14 **Q. Were you able to find support in the**
12:50:16 **literature for the posterior arm injury to be more**

12:50:22 **likely to be caused by the natural forces of labor?**

12:50:25 A. No. That's not supported by the literature

12:50:28 either. There's an easier-to-understand mechanism

12:50:33 for the anterior shoulder. I get that for sure.

12:50:36 But how clinicians, they deal with the posterior

12:50:41 shoulder, that's going to be up to the clinicians

12:50:44 dealing with this. That's not something I can opine

12:50:49 about. I'm only going to be talking about the

12:50:51 literature, how it supports the opinions of these

12:50:54 experts.

12:51:20 **Q. All right. Let's scroll down to the bottom**

12:51:23 **of this page 18 and move on to 19. Now, this is**

12:51:51 **Dr. DeMott's published study about cases in two**

12:51:58 **Green Bay hospitals. Right?**

12:52:00 A. Yes.

12:52:01 **Q. Okay. Let's look at table 3 here which**

12:52:07 **you've copied. And why did you copy that in**

12:52:14 **particular?**

12:52:16 A. So I would understand what kind of data is

12:52:19 Dr. DeMott was relying on for the claims that he

12:52:23 makes in the paper and I would remember it easily.

12:52:27 **Q. And what's the significance of this**

12:52:29 **particular table?**

12:52:34 A. Well, it doesn't support Dr. DeMott's

12:52:36 claims that the injury must have occurred prior to

12:52:40 the dystocia.

12:52:44 **Q. Any other significance to this table?**

12:52:48 A. It doesn't describe pan-plexus avulsions.

12:52:58 **Q. Anything else?**

12:52:59 A. He has a total of what, eight injuries that

12:53:02 are even considered permanent in total.

12:53:07 That's all I can tell you about that table.

12:53:09 It's -- there is some consistency there with what

12:53:14 the large epidemiologic literature demonstrates with

12:53:20 regard to diabetic or macrosomic babies -- diabetic

12:53:25 moms or macrosomic babies and increased risk and

12:53:31 then look at those risk factors, which is what we

12:53:35 did with our matched maternal and neonatal data from

12:53:39 300,000 births.

12:53:44 **Q. And let's move on to the next page,**

12:53:47 **page 20. And here you have a table 4. Again, this**

12:53:52 **is from Dr. DeMott's article. Is that right?**

12:53:58 A. Yes.

12:54:01 **Q. And you've highlighted some items there.**

12:54:05 **Correct?**

12:54:06 A. Yes.

12:54:08 **Q. And you've differentiated the brachial**

12:54:11 **plexus injuries from the cephalhematoma. What's a**

12:54:18 **cephalhematoma?**

12:54:20 A. You say I differentiated it from the

12:54:22 cephalhematoma?

12:54:24 **Q. Yeah, by highlighting it.**

12:54:27 A. Oh, I was not specifically differentiating between cephalhematoma and brachial plexus. I was highlighting brachial plexus in that list. The cephalhematoma is typically associated with a vacuum extraction, however.

12:54:43 **Q. So in this list there were five different types of birth trauma. Right?**

12:54:48 A. Yes.

12:54:48 **Q. And cephalhematoma is the first one, looks like, according to your experience or from the literature, is usually associated with vacuum deliveries?**

12:55:07 A. That's correct.

12:55:08 **Q. And this was not a vacuum delivery, was it?**

12:55:12 A. Not as far as I understand.

12:55:15 **Q. Are you familiar with cephalhematoma occurring without a vacuum delivery?**

12:55:20 A. Sure. It can. It's just highly associated with a vacuum delivery.

12:55:25 **Q. And then the other injuries include clavicular fracture, skull fracture, and intracranial hemorrhage. Right?**

12:55:37 A. Correct.

12:55:37 **Q. And those all can occur with vaginal**
12:55:42 **births. Right?**
12:55:44 A. Sure.
12:55:45 **Q. And they occur spontaneously without any**
12:55:48 **traction by the clinician. Correct?**
12:55:54 A. You're using the word "spontaneously"
12:55:56 different than I would, but if you are -- if the
12:55:59 statement is they occur without traction, I don't
12:56:05 think that is demonstrated by this table.
12:56:10 **Q. By your review of the literature generally**
12:56:15 **in terms of the incidence of birth trauma, you would**
12:56:21 **agree that clavicular fracture, skull fracture, and**
12:56:26 **intracranial hemorrhage can occur as a result of the**
12:56:32 **natural forces of labor. Right?**
12:56:33 A. I agree with that.
12:56:35 **Q. And now again you've highlighted brachial**
12:56:41 **palsy in this case. What's the significance of that**
12:56:45 **in this table 4 of Dr. DeMott's article?**
12:56:49 A. It's to draw my attention to it so I can
12:56:53 find it easily when I'm looking at the table.
12:56:56 **Q. And why would you want to do that?**
12:56:58 A. Because I am looking at how Dr. DeMott has
12:57:02 used the literature to support his opinion that this
12:57:04 injury must have occurred prior to the dystocia and
12:57:11 that it was present for some other reason due to

forces of labor and unrelated to the maneuvers that were applied by the clinician delivering the baby.

Q. Did Dr. DeMott testify that this table 4 specifically supports that opinion?

A. He cited to the paper as support for his opinions generally. And the specific way that he used the paper when he testified, I can't answer that as I sit here because I don't actually have each statement from the deposition compared to the actual paper.

Q. So when you looked at these studies, you summarized the main opinions of each of these experts and then you looked at whether a particular study supported the overall opinion. Is that it?

MS. MACHLER: Object to the form.

THE WITNESS: I would say generally that's true, yes. Whether or not we had -- whether the cited paper was specifically supportive of any of the opinions was really my primary goal in looking through all of these papers.

Q. BY MS. MONIZ: What does this particular table tell us?

A. It doesn't tell us anything that supports Dr. DeMott's opinion.

Q. What does it tell us?

12:58:57 A. With regard to what my analysis is, that's
12:59:02 it. I mean, if you're looking just at brachial
12:59:06 plexus injuries, it shows that you avoid brachial
12:59:09 plexus injuries when you have a Cesarean section.
12:59:11 That's pretty well-established, included in my
12:59:14 research. But I don't think anyone is really
12:59:18 disagreeing with that.
12:59:19 **Q. Well, are you aware that there in fact have**
12:59:22 **been reports of brachial plexus injuries in Cesarean**
12:59:26 **sections?**
12:59:28 A. I'm quite aware of that because I published
12:59:30 those data. But I'm also aware of the reduction of
12:59:33 risk as at least 80 to 90 percent when a Cesarean
12:59:39 section is performed.
12:59:40 **Q. So you would agree that brachial plexus**
12:59:45 **injuries can occur with Cesarean sections?**
12:59:49 A. They are possible, yes.
12:59:51 **Q. All right. Let's move on to the next page.**
01:00:07 **Could we scroll down to the next page. All right.**
01:00:14 **Let's stop there.**
01:00:32 **This study, your comment right near the top**
01:00:36 **there:**
01:00:36 **"This study does not describe any**
01:00:39 **complete avulsions."**
01:00:39 **This study doesn't tell exactly which**

01:00:45 **nerves are injured or how they are injured.**
01:00:49 **Correct?**
01:00:51 A. Correct.
01:00:52 **Q. They're not even looking at that. Right?**
01:00:55 A. As far as whether it's anterior or
01:00:57 posterior, that is correct.
01:00:58 **Q. Well, and it doesn't state whether there's**
01:01:02 **an avulsion, neuroma, or a nerve rupture. Correct?**
01:01:08 A. It doesn't describe any avulsions, any
01:01:11 complete avulsions, and doesn't describe traction
01:01:15 forces.
01:01:18 **Q. Dr. Freeman, it doesn't describe the nature**
01:01:21 **of the nerve injury, such as an avulsion, neuroma,**
01:01:26 **or nerve rupture, does it?**
01:01:29 A. It doesn't describe the specific pathology
01:01:31 of the injury, if that's your question.
01:01:44 **Q. All right. Under looks like B -- we've**
01:01:46 **switched from numbers to letters -- B, Stirrat 2002.**
01:01:53 **This is a review article, you comment, for a**
01:01:57 **clinical legal journal that cites Dr. DeMott's**
01:02:02 **paper?**
01:02:03 A. Yes.
01:02:04 **Q. And, in fact, Dr. DeMott has actually done**
01:02:08 **research himself on brachial plexus injury in**
01:02:14 **addition to actually being a practicing obstetrician**

01:02:18 **for nearly 40 years. Right?**

01:02:22 A. He has published papers on brachial plexus

01:02:25 injuries, and I understand him to be an

01:02:26 obstetrician.

01:02:36 **Q. Now, you yourself write for legal journals**

01:02:39 **as well. Correct?**

01:02:40 A. I write for forensic medical journals.

01:02:44 That is one of the publishers, scientific publishers

01:02:49 that I write for.

01:02:50 **Q. And you write for plaintiff's attorneys.**

01:02:52 **Right?**

01:02:53 A. I have written a couple of papers that have

01:02:55 been published. Out of over 220 or 230

01:02:59 publications, I've written a couple of papers that

01:03:03 have gone into lawyer-only journals. But it is a

01:03:12 very trivial amount of my output.

01:03:30 **Q. And this particular review article does**

01:03:40 **talk about posterior shoulder injuries. Correct?**

01:03:46 **Or posterior arm injuries?**

01:03:53 A. I'd have to look at my notes.

01:03:56 **Q. Would you scroll down just a little bit,**

01:03:58 **May, please.**

01:04:17 THE VIDEOGRAPHER: Is that good, Counsel?

01:04:19 MS. MONIZ: A little bit farther, please. Okay.

01:04:29 That's good.

01:04:45 **Q. Is this then another quote from the Stirrat**
01:04:51 **article that you highlighted?**
01:04:53 A. Well, it's Dr. DeMott's quote. Dr. DeMott
01:04:56 is quoting a paper that's quoting him and using the
01:05:00 paper as some sort of external validation, which it
01:05:05 clearly is not.
01:05:09 **Q. In your opinion?**
01:05:10 A. No. It's a fact. Dr. DeMott is quoting to
01:05:11 Stirrat as an independent source of this information
01:05:16 and doesn't mention that he's the one who is being
01:05:19 quoted by Stirrat. That's the --
01:05:22 **Q. Was he asked that in his deposition?**
01:05:25 A. I think it's something that either you
01:05:28 mention it or not, but you don't use a quote of your
01:05:31 own work and then present it as somebody else's
01:05:38 work. That's not really the way you're supposed to
01:05:40 do it. He can say well, this person felt that they
01:05:43 should put it in their paper, but you should say
01:05:46 whether it's a quote of your own work. I think from
01:05:50 a scientific perspective it's confusing at best to
01:05:56 see somebody quoting from somebody else when it's
01:05:59 actually a quote of themselves.
01:06:03 **Q. Didn't you actually do a similar thing**
01:06:04 **earlier in today's deposition when you referred to a**
01:06:08 **study and then when asked mentioned oh, by the way,**

01:06:11 **it's your study, as if you were surprised?**

01:06:15 MS. MACHLER: Object to the form.

01:06:18 THE WITNESS: No. What I did was I answered your question what's the authority for it. I cited to the paper and gave you the name. And when you asked me who the author was, I told you it was my paper. That's not the same thing as saying somebody else wrote something that quoted me but I'm not going to tell you that I'm the one who's actually quoted in it.

01:06:41 **Q. BY MS. MONIZ: Well, in this case Dr. Stirrat appeared to approve of the publication by Dr. Sandmire and Dr. DeMott regarding this matter. Correct?**

01:06:53 A. Is that your perception of it? Because it's not mine.

01:06:57 **Q. All right. Let's scroll down a little bit more. Okay.**

01:07:36 A. This is actually a criticism -- at least that's the way I read it -- of DeMott's theories.

01:07:42 **Q. There wasn't a question there, Dr. Freeman.**

01:07:45 A. Oh, I thought I was still answering the same question. You asked me whether or not it was approved.

01:07:58 **Q. Okay. Let's scroll down a little more.**

01:08:11 Up. Up. Sorry. I'm not reading that fast.

01:08:30 Now, this highlighted part, are these your

01:08:33 comments or comments from the article or an article?

01:08:40 A. I think they're comments that Stirrat said

01:08:44 about DeMott's theory.

01:08:47 Q. Go ahead and scroll down just a little bit,

01:08:49 please, May. Okay.

01:09:04 The last highlighted comment there under

01:09:08 "Conclusions" says:

01:09:09 "Damage to the plexus of the posterior

01:09:12 shoulder can occur and is associated with

01:09:15 pressure on the sacral promontory. This is

01:09:20 not due to any action of the accoucheur and

01:09:25 is therefore not negligent by definition."

01:09:28 Is that what it says?

01:09:29 A. Yes.

01:09:34 Q. And I take it you disagree with that?

01:09:37 A. I don't comment on it.

01:09:39 Q. Okay. And then just under that it says

01:09:44 "Assessment." Now, this is your assessment?

01:09:49 A. Yes.

01:09:50 Q. Okay. Scroll down just a little bit,

01:09:52 please, May. Okay.

01:10:05 Your testimony is there's no evidence

01:10:08 presented in the paper about the cause of posterior

01:10:13 **arm injury. Is that it?**

01:10:20 A. Is that what I wrote? Was that the

01:10:21 question?

01:10:22 **Q. Yeah. Is that your testimony?**

01:10:24 A. That is my testimony. The authors present

01:10:27 no evidence, no investigation, no data, no

01:10:30 epidemiologic information that allows for any

01:10:33 information concerning posterior arm injuries and

01:10:37 how they do or do not occur. It is merely a

01:10:41 repetition of a theory and doesn't -- there's no

01:10:45 validation of it.

01:10:56 **Q. And you say there's no evidence in this**

01:10:58 **paper about the severity of the injury or the type**

01:11:01 **of force it takes to cause a pan-plexus avulsion.**

01:11:07 **But that's not what this paper is writing about, is**

01:11:10 **it?**

01:11:11 A. This paper is not writing about it and

01:11:13 doesn't support Dr. DeMott's theory that in ZH's

01:11:17 case, this paper in any way supports his claim that

01:11:20 the injury must have occurred before the dystocia.

01:11:32 **Q. This paper doesn't tell us in this case or**

01:11:40 **in those cases the timing of injury. Correct?**

01:11:45 A. In this particular paper are you asking?

01:11:48 **Q. Yes.**

01:11:50 A. I couldn't tell you. I pulled out the

01:11:53 parts of the paper that I was most interested in.
01:11:56 And if timing was described in the paper, it's not
01:12:00 something I can tell you off the top of my head
01:12:02 about.
01:12:17 **Q. All right. Let's talk about this Chauhan**
01:12:23 **2005 paper. And this one talks about the incidence**
01:12:38 **of brachial plexus injuries and concludes that**
01:12:44 **brachial plexus injury occurs in one in 1,000**
01:12:49 **births. Do you agree with that conclusion?**
01:12:52 A. That's -- around one to 1.5 in a thousand
01:12:56 is generally what the literature indicates and what
01:12:59 the general hospital data shows that we use for our
01:13:03 380,000 patient study.
01:13:06 **Q. And the incidence of permanent injury is**
01:13:09 **approximately one in 10,000. Do you agree with**
01:13:13 **that?**
01:13:13 A. Yes. It's about one out of ten of the
01:13:16 injuries become permanent generally seems to be
01:13:20 agreed on in the literature.
01:13:22 **Q. And then litigated cases are one in 45,000?**
01:13:47 A. Yes. The rate of the litigation is the one
01:13:53 in 45,000, which is typically in the proportion of
01:14:00 the one in 10,000.
01:14:07 **Q. So most brachial plexus injuries don't lead**
01:14:13 **to a lawsuit. Right?**

01:14:15 A. Right. Only about 2 or 3 percent.

01:14:27 **Q. All right. Let's scroll to the next page,**
01:14:30 **please. Now, this is another publication by**
01:14:40 **Dr. Sandmire and Dr. DeMott, 2008. This is a review**
01:14:48 **article, as you point out. Says -- you've**
01:14:53 **highlighted "It can no longer be stuck at the time**
01:14:57 **the head crowns." Why did you highlight that?**

01:15:00 A. Well, this is a review and editorial with
01:15:04 peer opinion provided in it. So Dr. DeMott is
01:15:07 promoting his theory that nothing that the attendant
01:15:12 does is going to cause this injury. That's what I'm
01:15:16 pointing out is that this is simply an editorial and
01:15:20 Dr. DeMott repeating the same opinions that he's
01:15:24 given in this lawsuit, which is that there is no
01:15:26 responsibility on the practitioner because the
01:15:26 injury always occurs before the practitioner touches
01:15:30 the baby.

01:15:31 **Q. Well, he explains what the mechanism of**
01:15:36 **injury to the posterior arm is. Correct?**

01:15:38 A. No. He explains his theory that the injury
01:15:42 always occurs prior to any kind of manipulation or
01:15:46 maneuvering of the fetal head. How that injury does
01:15:52 or does not occur is not an area that I'm
01:15:54 addressing, however, because that's not addressed in
01:15:58 any of the literature cited by any of these experts.

There's a theory that Dr. DeMott has promoted, and he's written about it a bunch of times, giving the same citations to his original theory, but he's never done anything to demonstrate that the theory is in any way true or accounts for a certain percentage of the injuries or not. It's simply still stuck at the theory stage.

Q. You've written here but not highlighted:

"When obstructed by sacral promontory, posterior shoulder must pass 12 to 13 centimeters to allow delivery."

Do you have an opinion about whether or not that is an accurate statement?

A. I do not.

Q. Do you have an opinion based on these studies what the cause of spontaneous brachial plexus injuries to the posterior arm are?

A. I'm sorry. I just saw Laury waving, and I just want to make sure that she wasn't -- there wasn't a problem for her getting down what we were saying.

THE COURT REPORTER: I wasn't sure that I got your last answer correctly, but I just flagged it for myself and I'll check the audio. Or I can repeat it to you.

01:17:31 THE WITNESS: I just didn't want to blindly go on. So I'm sorry. I apologize for interrupting the flow of the question there. So the -- would you mind giving me the question one more time? I just want to make sure I got it right.

01:17:46 MS. MONIZ: Would you go ahead and read it back, Laury, please.

01:17:48 (The record was read as follows:

01:18:05 "Q. Do you have an opinion based on these studies what the cause of spontaneous brachial plexus injuries to the posterior arm are?")

01:18:10 THE WITNESS: The cause of spontaneous injuries? Well, if the cause is spontaneous, then it's anything but the actions of the clinician.

01:18:21 **Q. BY MS. MONIZ: And what specifically can you tell us causes that based on these studies?**

01:18:32 A. Oh, I don't think these studies establish what causes the posterior injuries, and they certainly don't show that they occur more often spontaneously than non-spontaneously. That information has never been discovered or reviewed. It's simply a theory that Dr. DeMott has promoted and continues to promote at the same level, being a theory that is unproven. There's --

01:18:51 **Q. Dr. Freeman --**

01:18:51 A. -- (inaudible) information on that.

01:18:52 **Q. Dr. Freeman, once again, at the rate of 850 to $900 an hour, can we stick to one question, one answer at a time, please.**

01:19:02 A. I thought that was exactly what I was giving you. I think I've done a pretty good job so far. I'm doing my best.

01:19:10 **Q. Well, at least you haven't mentioned kindergarten again, so that's progress, I guess.**

01:19:15 A. The deposition is not over.

01:19:17 **Q. That's true. It could come up again.**

01:19:19 A. Possibly.

01:19:28 **Q. Dr. Freeman, in the studies you've reviewed and that are mentioned in this 39-page notes of yours, can you determine how the natural forces of labor would injure a posterior arm?**

01:19:53 A. No. That is outside of my area of expertise. I consider that to be more of an issue of the anatomy and physiology and pathophysiology of birth, which is not an area that I -- it's not an area I've ever written about or I've studied, so I will leave that up to others.

01:20:19 And let me know, by the way, whenever you're ready, is a good time for another leg

01:20:24 stretch.
01:20:25 **Q. Okay. Let's go ahead and do that now.**
01:20:28 A. Thank you.
01:20:31 THE VIDEOGRAPHER: The time is 1:20 P.M. We're
01:20:35 off the record.
01:20:36 MS. MONIZ: Let's take about ten minutes this
01:20:38 time.
01:20:40 (Recess.)
01:32:49 THE VIDEOGRAPHER: The time is 1:32 P.M. We're
01:32:52 back on the record.
01:32:56 **Q. BY MS. MONIZ: Okay, Dr. Freeman. Let's go**
01:33:00 **ahead and put back up Exhibit 4. And let's scroll**
01:33:16 **down a little bit to No. 6. There should be a 6 by**
01:33:24 **it. Yeah. Keep going. Oh, there we are.**
01:33:39 **Now, this is another article published by**
01:33:43 **Dr. Sandmire and Dr. DeMott. And his name is**
01:33:52 **highlighted. There's a table copied which is a**
01:33:56 **little hard to see, but I think it's entitled "Erb's**
01:34:09 **Palsy With and Without Shoulder Dystocia," comparing**
01:34:13 **the research studies. Is that right?**
01:34:16 A. Yes.
01:34:17 **Q. And why did you copy this particular table?**
01:34:23 A. Well, I am demonstrating that there does
01:34:31 not appear to be any significant difference in the
01:34:37 anteriority and posteriority of where the injury

occurs. That they both, both anterior and posterior, occur with and without shoulder dystocia, as demonstrated by Gherman. And this in no way allows for any inference of where the posterior -- a posterior shoulder is going to get injured. It simply doesn't tell you whether or not it's related to the actions of the clinician.

Q. Does this study show that you can have a brachial plexus injury without shoulder dystocia?

A. Yes. That's well-established.

Q. So you would agree with that. Right?

A. That's well-established. The question is whether or not you can say that there's no increased risk when there's traction added, and that's not supported by any of the literature cited by any of these experts.

Q. Now, the rest of these notes, 27 to 39, pertain to Dr. Michelle Grimm's references. Correct?

A. Yes.

Q. And Dr. Grimm did her own research as a biomedical engineer. Correct?

A. She cites to some of her own research. Correct.

Q. Well, are you contesting whether she did

01:36:34 **her own research on that?**

01:36:37 A. No. I'm not commenting on her research at

01:36:40 all. When you say she did or own research, that to

01:36:46 me suggests that you're specifying that she only

01:36:49 talked about her research, and that's not true. She

01:36:52 talked about others' research too.

01:36:55 **Q. So you would agree that Dr. Michelle Grimm**

01:37:01 **is a biomedical engineer. Right?**

01:37:06 A. Yes. You already asked me that, and I

01:37:08 already agreed to that.

01:37:09 **Q. And she has done studies on brachial plexus**

01:37:12 **injury. Correct?**

01:37:14 A. Well, she's done studies, models that are

01:37:20 attempting to form an experimental explanation for

01:37:25 brachial plexus injuries. She hasn't done studies

01:37:28 of the injuries themselves, at least not as far as I

01:37:32 understand.

01:37:33 **Q. She has done studies that have been**

01:37:36 **published in the medical literature, the**

01:37:39 **peer-reviewed medical literature. Correct?**

01:37:42 A. Yes. All the studies she cited to that she

01:37:45 wrote are in peer-reviewed journals.

01:37:48 **Q. And some of those studies were funded by**

01:37:51 **the National Institutes of Health and the National**

01:37:55 **Science Foundation. Right?**

01:37:58 A. I didn't pay any attention to who the
01:38:01 funding agent was.
01:38:07 **Q. Let's scroll down a little bit to No. 3,**
01:38:19 **"Literature." There we go. And this Allen 1994 was**
01:38:34 **one of the references that Dr. Grimm cited?**
01:38:42 A. Correct.
01:38:52 **Q. And then if we scroll down to the next**
01:38:57 **page, still talking about this study, you've**
01:39:06 **highlighted:**
01:39:09 "Injury Including Force Levels (100
01:39:12 Newtons) are reached for many clinicians
01:39:18 (74 percent and 82 percent))for difficult
01:39:24 and shoulder dystocia deliveries and for
01:39:27 some clinicians (31 percent))for routine
01:39:34 deliveries."
01:39:39 And then there's a P factor. Why did you
01:39:44 highlight this particular portion?
01:39:49 A. Well, it's something that isn't being
01:39:52 emphasized by any of these experts is the fact that
01:39:55 if you look at the biomechanical studies, which I'm
01:39:58 quite familiar with and quite familiar with the
01:40:00 methods used in them, that they indicate a pretty
01:40:03 broad range of forces that are used by a broad range
01:40:07 of practitioners and don't really give us an idea of
01:40:12 what's being done by even a reasonable sample of the

practitioners out there, but the studies do show that the loads are sufficient to cause injury when it's hypothesized at around 22 pounds of traction force, and that that is something that -- that's a level of force that is reached by a large number of clinicians.

Q. And this study did not look at all at the force by the natural forces, the forces by the uterus. Right?

A. No. It looked only at the forces of the clinicians.

Q. And like most of the OB studies, it doesn't distinguish the type of injury other than to say temporary or permanent. Right?

A. I'm looking for the temporary or permanent part. I don't know that they specify temporary or permanent, and I don't see that in the notes that I have here. Certainly there were no injuries that were generated. This is an experiment done in laboratory conditions. So I guess the answer is I don't see anything that tells me that. But that may be in that paper. I just didn't write it.

Q. Let's move on to B. Now, this study by Dr. Gonik and Dr. Grimm in 2003 did look at the maternal endogenous forces or the forces of labor as

01:42:13 **well as clinician-applied forces. Correct?**

01:42:18 A. Well, they attempted to model it using a

01:42:21 finite element computer program called the MADYMO,

01:42:23 M-A-D-Y-M-O. They didn't actually look at the

01:42:28 injuries themselves.

01:42:33 **Q. Well, they're talking about shoulder**

01:42:35 **dystocia, not an injury. Correct?**

01:42:39 A. That is true. And it's all based on the

01:42:42 use of what's called a CRABI, C-R-A-B-I, a basically

01:42:49 computer-animated crash test dummy that they

01:42:53 modified to some degree to use for this study.

01:43:11 **Q. Let's move on to the next one, and let's**

01:43:28 **move on to where we can see table 2. Now, this is**

01:43:33 **another Gonik and Grimm article, 2003 -- right? --**

01:43:38 **also using a computer simulation model?**

01:43:50 A. Yes.

01:43:50 **Q. Is that right?**

01:43:51 A. I said yes.

01:43:53 **Q. Okay. And what's the significance of**

01:43:56 **table 2?**

01:44:02 A. Well, nothing other than the fact that it

01:44:05 doesn't support any kind of supposition that adding

01:44:11 exogenous traction, as Dr. Grimm is describing it in

01:44:16 this paper, does not increase the risk of any

01:44:22 brachial plexus injury, much less a permanent

01:44:25 brachial plexus injury, much less than a five-level
01:44:31 pan-plexus avulsion injury.
01:44:42 The other important part of the study is
01:44:44 the fact that Dr. Grimm appropriately states that
01:44:47 there are no currently established thresholds for
01:44:52 brachial plexus nerve disruption of the fetus and
01:44:54 that the results of the experiments cannot be
01:44:58 directly applied to the clinical arena.
01:45:09 **Q. Well, this paper is looking at the forces**
01:45:13 **that are both endogenous to the mother, including**
01:45:17 **the contraction and the pushing, as well as**
01:45:22 **exogenous, which in this case they're describing as**
01:45:25 **the position of the mother. Correct?**
01:45:30 A. I'm sorry. What was -- I didn't catch the
01:45:34 last part of the question about the position of the
01:45:36 mother, which was just --
01:45:39 **Q. They're calling it -- well --**
01:45:42 A. Lithotomy versus McRoberts? Is that what
01:45:45 you're referring to?
01:45:47 **Q. Yes. They're calling that exogenous.**
01:45:50 A. No. It's exogenous load versus an
01:45:55 endogenous load. They're not -- they're looking at
01:45:57 it, those loads, in either a lithotomy or a
01:46:00 McRoberts' position and varying those different
01:46:05 positions. So those are two different things in the

paper.

Q. This paper measures the delivery force of the contractions and pushing in the different positions of the mother. Correct?

A. The only differentiation I would have there is they don't measure anything. They report what their crash test dummy model showed with regard to the degree of stretch that occurred. They don't actually have any nerves to stretch so they're just stretching these little ellipsoids on the MADYMO model.

Q. Well, they're measuring delivery force as well as stretching of the brachial plexus. Correct?

A. Well, they're trying to account for delivery force by using estimates from the literature and saying here's what the force might be from a delivery. Here's what it might be from endogenous.

Endogenous versus exogenous. I said the same thing there. I meant to differentiate between endogenous, which that is the delivery force, versus exogenous, which is clinician-applied traction. And then there is this theoretical construct that they have where they look at different scenarios. It's an interesting study, and I certainly don't

01:47:33 disregard the results of the study, but they in no
01:47:38 way support the ultimate conclusion Dr. Grimm is
01:47:41 making in this case.
01:47:45 **Q. There's no single study that supports the**
01:47:50 **opinion of any expert that it either is caused by**
01:47:57 **the natural forces of labor or is caused by traction**
01:48:03 **by the clinician or a combination. Correct?**
01:48:07 A. No. That's completely false. We already
01:48:10 talked about those studies. There are several
01:48:12 studies that show when you add traction, you
01:48:16 increase the risk of this injury. So the fact
01:48:17 that --
01:48:18 **Q. That's a different question.**
01:48:19 A. I thought I was answering exactly the
01:48:22 question you asked, so maybe I misheard it. You
01:48:25 want to give it to me one more time? I'll see if I
01:48:27 can do better.
01:48:30 **Q. Can you identify a single study as opposed**
01:48:35 **to a review paper or an epidemiological study that**
01:48:42 **says specifically that either the natural forces**
01:48:47 **alone or traction alone or a combination causes a**
01:48:54 **particular injury?**
01:48:55 MS. MACHLER: Object to the form.
01:48:57 THE WITNESS: The thing you just asked me about
01:48:59 doesn't exist anywhere in the world or in

literature. You don't cause particular injuries in the real world and then try to do an experiment about how you did that. The studies are observational. You look at them afterwards, and you can't quantify the effect without looking at the risk. So when you say well, don't look at any epidemiological studies, now you're just talking about speculation or theories that don't have any validation. You got to incorporate the epidemiology in there or else you don't have any way of validating what your theory is.

Q. Well, the epidemiology just talks about incidents and risk. It doesn't tell us what caused an injury in a particular case, does it?

A. It tells us what risk factors increase the risk and by how much they increase the risk. So if you triple the risk of a brachial plexus injury because you add traction, which is about what the literature and the data tend to show us, that means that even though you can get the injury without the traction, because the injury is so rare, the injury just doesn't happen very often, and you add another factor which triples the risk of the injury, if you have an injury and you have the risk factor present with all the other factors, then you cannot ignore

01:50:21 that risk factor that's present. You can't ignore
01:50:24 the external forces. That's what that tells us.
01:50:27 And that's the only way for us to know.
01:50:30 It's like saying -- well, no. You don't
01:50:32 want me to give you explanations, so I won't give an
01:50:36 explanation.
01:50:37 **Q. Well, whether the risk of something is**
01:50:40 **higher or lower in general doesn't necessarily tell**
01:50:44 **us what actually happened in a particular case where**
01:50:48 **we actually have evidence. Correct?**
01:50:51 A. You have evidence of what? I mean, that's
01:50:54 such a nonspecific question. There's no evidence as
01:50:58 to where this child's injury occurred. There's no
01:51:02 evidence that this baby's shoulder got stuck on the
01:51:06 sacral promontory. It's a theory, and it's fine.
01:51:09 Put that theory out. There's also a theory that
01:51:12 manipulating a child's head and shoulder to try to
01:51:16 release the posterior dystocia also caused the
01:51:20 injury. Those are both explanations given by
01:51:22 clinicians.
01:51:23 I'm not weighing in on that one. I'm
01:51:26 saying that the literature cited by these experts
01:51:29 who say it can't occur or it always must occur due
01:51:32 to endogenous forces isn't proven in any way
01:51:37 whatsoever by any of the literature that's cited.

01:51:40 It simply is not supported.

01:51:43 **Q. And why is that your opinion, that it's not**
01:51:47 **supported not only by not one individual study but**
01:51:51 **the literature as a whole?**

01:51:54 A. Because none of the literature has done
01:51:56 what you just asked me to do, which is to show how
01:51:58 these injuries occur in some sort of mechanistic
01:52:03 way, actually looking at the injuries themselves.
01:52:06 Nobody's done that.

01:52:07 So Dr. DeMott has got a theory. His theory
01:52:10 is that it must always be in the sacral promontory.
01:52:15 Okay, that's his theory. Well, when you talk about
01:52:18 the specifics of the case and you bring in a
01:52:18 practitioner and the practitioner says "Well,
01:52:20 actually, I looked at what was described as the gun
01:52:25 and I believe that that is a more likely cause"
01:52:28 because for every posterior birth the risk of having
01:52:33 a shoulder dystocia, number one, and, number two, a
01:52:37 shoulder dystocia associated with a brachial plexus
01:52:40 injury in a general population is very, very small,
01:52:42 and the chance of having this injury is even much,
01:52:45 much smaller. So this injury isn't explained just
01:52:49 by the fact that posterior shoulder entrapment
01:52:53 always occurs or it occurs before any clinician
01:52:59 touches the baby. That's -- there's no evidence

01:53:03 that's true. It's just still a theory. But you
01:53:06 have to ignore the facts that are coming from other
01:53:10 experts saying "Well, I think what they did actually
01:53:13 added to the injury risk."
01:53:16 **Q. But those are not facts. Those are not**
01:53:19 **facts. Those are opinions of other experts which go**
01:53:23 **contrary to the testimony in the case. Right?**
01:53:26 MS. MACHLER: Object to the form.
01:53:31 THE WITNESS: The interpretation of what
01:53:33 happened during the birth is going to be an opinion
01:53:39 and inference made by the experts in those areas. I
01:53:43 agree with that completely.
01:53:45 **Q. BY MS. MONIZ: And you're not going to give**
01:53:46 **an opinion based on any of those inferences because**
01:53:49 **you're not an expert in delivering babies. Right?**
01:53:53 A. I have no opinions about standard of care,
01:53:54 as we talked about a couple hours ago, and I still
01:53:57 don't. I haven't gained any opinions in that area.
01:54:00 I am going to talk about the fact that the
01:54:03 opinions that have been provided by the defense
01:54:05 experts and the literature as cited to to support
01:54:10 those opinions actually don't. They don't gel.
01:54:12 They don't come together. There is no support for
01:54:16 the inferences made and the opinions made by the
01:54:20 defendant's experts. They don't have any evidence

01:54:23 to show that their opinions apply in this case. And
01:54:26 they don't have any evidence to show that their
01:54:28 opinions even can apply in this case. There's no
01:54:31 evidence that a posterior shoulder stuck on the
01:54:34 sacral promontory can cause a five-level avulsion.
01:54:38 I'm not saying it can't. They just don't cite to
01:54:41 any literature or evidence that that's true.
01:54:52 **Q. All right. Let's take down this exhibit.**
01:55:04 **If the literature doesn't support that the**
01:55:14 **traction does not exacerbate injury from the natural**
01:55:20 **forces of the labor, then the opposite is true as**
01:55:23 **well. Correct?**
01:55:24 MS. MACHLER: Object to the form.
01:55:28 THE WITNESS: Can I get that just one more time?
01:55:30 I want to make sure I completely got all of the
01:55:33 premises of the question.
01:55:34 MS. MONIZ: Would you read that back, please,
01:55:36 Laury.
01:55:57 (Record read.)
01:55:59 THE WITNESS: You're talking about -- I guess
01:56:00 the question is a hypothetical since the literature,
01:56:03 even the literature cited by the defendant's
01:56:06 experts, does show that risk of this injury goes up
01:56:10 when external forces are applied.
01:56:13 So I guess if you're asking me to assume a

01:56:16 hypothetical that that literature doesn't exist and
01:56:20 there never was any epidemiologic evidence that
01:56:23 injury risk is increased when you apply external
01:56:23 traction, I would agree.
01:56:26 I mean, it would also -- it would come down
01:56:29 to opinions by clinicians and there would be no
01:56:32 externally validated evidence of either theory.
01:56:37 **Q. Well, are you equating traction with the**
01:56:42 **maneuvers used to resolve shoulder dystocia?**
01:56:47 A. No. I'm equating traction with externally
01:56:50 applied or exogenous force versus just purely forces
01:56:54 of labor.
01:56:56 **Q. Well, we just talked about Dr. Grimm's**
01:56:59 **study where she used the term "exogenous" to**
01:57:03 **describe the lithotomy versus McRoberts' position.**
01:57:11 **Would you agree that's an exogenous force?**
01:57:14 A. No, she did not use it that way. I thought
01:57:16 I had explained the fact that exogenous and
01:57:19 endogenous forces are separate from the position
01:57:22 assumed in the MADYMO modeling.
01:57:26 **Q. So would the Wood's screw maneuver be an**
01:57:30 **exogenous force?**
01:57:31 A. Yes.
01:57:32 **Q. Would the super-pubic pressure be an**
01:57:36 **exogenous force?**

01:57:37 A. Yes.

01:57:38 **Q. And would rotating the arm or shoulder be**

01:57:43 **an exogenous force?**

01:57:45 A. Yes. Those are all externally applied by

01:57:48 the clinician.

01:57:53 **Q. So when you say there's an increased risk**

01:57:55 **of brachial plexus injury with traction, you're**

01:58:02 **including the accepted maneuvers for resolving a**

01:58:07 **shoulder dystocia. Correct?**

01:58:14 A. I'm not commenting on that, on that aspect

01:58:16 of it. What I'm commenting on is whether a rare

01:58:21 injury that might occur from only forces of labor is

01:58:26 increased when exogenous forces are applied. I'm

01:58:29 not commenting on the way the forces are applied,

01:58:33 just that they are exogenous forces.

01:58:37 **Q. So when you define exogenous forces, you**

01:58:41 **are including gentle traction, excess traction,**

01:58:49 **Wood's screw maneuver, superpubic pressure, and**

01:58:56 **attempting to rotate the baby. Correct?**

01:58:59 A. That is incorrect.

01:59:02 **Q. Okay. What is incorrect about it?**

01:59:05 A. That's not what I'm including in the list.

01:59:08 When I'm referring to exogenous forces, traction

01:59:11 forces and the evidence for traction forces

01:59:15 increasing risk, that is referring specifically to

01:59:18 instruments at birth. So vacuum or forceps.

01:59:27 **Q. So your opinion that the literature**
01:59:33 **supports the exogenous forces adding to the risk of**
01:59:43 **brachial plexus injury from the natural forces of**
01:59:53 **labor would be limited to forceps or vacuum. Is**
02:00:00 **that right?**

02:00:01 MS. MACHLER: Object to the form.

02:00:03 THE WITNESS: No, that is not right.

02:00:07 **Q. BY MS. MONIZ: Okay. Why don't you tell**
02:00:08 **me, when you are saying that the exogenous forces**
02:00:13 **increase the risk of injury beyond what the natural**
02:00:18 **forces of labor cause, what are you including in**
02:00:23 **those exogenous forces?**

02:00:27 A. Well, exogenous forces would include any
02:00:30 forces that could apply traction to the brachial
02:00:34 plexus. So that can run a whole gamut that is best
02:00:41 describe by somebody who delivers babies, not by me.
02:00:46 But when I describe the evidence that external force
02:00:49 increases risk, particularly in the form of
02:00:52 traction, that evidence in the epidemiologic data
02:00:57 comes from the coding for forceps and vacuum
02:01:02 extraction and comparing that to the forces of labor
02:01:04 in the absence of vacuum extraction but adjusting
02:01:07 for all of the other predictive elements.

02:01:12 **Q. So your epidemiological opinions do not**

02:01:19 **address whether there was excess traction used by a**
02:01:25 **clinician manually to try to resolve a shoulder**
02:01:30 **dystocia. Correct?**
02:01:32 MS. MACHLER: Object to the form.
02:01:34 THE WITNESS: That's standard of care stuff.
02:01:36 I'm not going to say that this nurse midwife used
02:01:40 too much traction. That is certainly beyond
02:01:43 anything that I've ever been proposed to testify
02:01:45 about because it's not an area in which I practice.
02:01:48 **Q. BY MS. MONIZ: And it was not addressed --**
02:01:49 **that issue was not addressed in your own**
02:01:53 **epidemiological analysis. Correct?**
02:01:58 A. Whether or not manual maneuvers are a risk
02:02:04 factor? No. That's correct. They are not -- they
02:02:05 are too variably coded to rely on the literature.
02:02:13 At least -- excuse me -- in the data that we're
02:02:15 talking about.
02:02:17 **Q. Yeah. The kinds of codes that are**
02:02:21 **sometimes used in epidemiological research and that**
02:02:26 **are mentioned in your notes do not necessarily**
02:02:30 **include things like is the amount of traction used**
02:02:35 **to deliver a baby, the maneuvers, or the direction**
02:02:38 **of the traction. Right?**
02:02:41 A. I've never seen any study, regardless of
02:02:44 whether it's epidemiologic or any other kind of

02:02:47 study, that actually made such a quantification or
02:02:50 detailed description in fact. There's a couple of
02:02:54 case studies that have that kind of detailed
02:02:56 information but without quantification. So no.
02:02:59 That simply does not exist in science.
02:03:04 **Q. But Dr. Freeman, specifically the coding**
02:03:07 **that we see that is sometimes used in**
02:03:11 **epidemiological studies would not include the fine**
02:03:16 **points of the type and direction of traction used to**
02:03:19 **resolve a shoulder dystocia. Right?**
02:03:22 A. That's correct. They're only going to tell
02:03:25 you the presence or absence of what things that are
02:03:29 coded in the record itself.
02:03:31 **Q. And that goes with what would not typically**
02:03:35 **be coded?**
02:03:35 A. They're not coded and they're not -- as far
02:03:37 as I know, they have never actually been described
02:03:40 in live birth when there's been injury.
02:03:42 **Q. And likewise, you wouldn't see transient**
02:03:45 **hypotonia in a newborn coded. Correct?**
02:03:50 A. Hypotonia is coded. That's incorrect.
02:03:55 **Q. Have you seen cases -- and maybe you don't**
02:03:57 **know from your nonclinical perspective, but have you**
02:04:01 **seen cases where transient hypotonia as evidenced by**
02:04:05 **a low APGAR score would be coded separately in the**

02:04:12 **data?**

02:04:18 A. Right. Well, the premise of the question
02:04:21 isn't great because I am a nonclinical medical
02:04:25 expert. However, the question you just asked me was
02:04:28 not about clinical medicine. You asked me about how
02:04:33 information is coded. And the answer is hypotonia
02:04:36 is coded looking at newborns however it's going to
02:04:44 be coded, whatever the indication for it is. If it
02:04:47 is because there's a low APGAR, that may be the
02:04:47 reason for coding it. If it's because there's a
02:04:50 brachial plexus injury and so the baby isn't moving
02:04:53 all of its extremities, that also may be coded as
02:04:58 hypotonia. So it's variable, but it's not
02:05:01 specified, so it doesn't go -- you're not going to
02:05:03 find hypotonia associated with an APGAR, for
02:05:07 example, in the international classification of
02:05:09 diseases coding that's used for the kind of data
02:05:13 we're talking about.

02:05:15 **Q. So you would not necessarily see transient**
02:05:20 **hypotonia in the newborn be coded at all. Right?**

02:05:25 A. Not in the data -- that's correct. That
02:05:28 would be something you would have to abstract from
02:05:30 clinical records, and that would typically be small
02:05:33 studies, maybe even case series. But you're not
02:05:37 going to find that in national hospital data. I

agree.

Q. All right. Other than the studies that we've discussed, are you planning to testify that Dr. Grimm, the biomedical engineer, is not qualified to testify as an expert in this case?

A. Oh, goodness, no.

Q. Okay. You would recognize that biomedical engineering is a respected subspecialty of academic pursuit?

A. Oh, yes. I taught injury biomechanics at the medical school where I'm a professor for 15 years, and I published over 60 papers on injury biomechanics. It's an area in which I practice extensively.

Q. And when you say you practice it, you're talking about as a chiropractor?

A. I'm not talking about a chiropractor in any way, shape, or form. I have six university degrees. One of them is a chiropractor, and I haven't been a chiropractor for a quarter of a century. So no, I'm not talking about that. I'm talking about more than 60 articles in the peer-reviewed scientific literature on biomechanics, particularly biomechanics of injury and my academic positions teaching it and designing courses in biomechanics of

injury. That's an area where I have a lot of experience and have testified hundreds of times in courts.

Q. So when you say "practice," you mean teaching and publishing, not clinical practice. Correct?

A. Forensic medicine is my practice. So when I testify like this and we're touching on anything that's medical, I'm testifying as a forensic medical expert as well as just an epidemiologist along with that.

Q. Let's go ahead and pull up the next exhibit, which will be an amicus brief. I think that will be No. 5.

THE VIDEOGRAPHER: That is correct, Counsel.

MS. MONIZ: Thank you.

(Whereupon Exhibit 5 was marked for identification by the Court Reporter.)

Q. BY MS. MONIZ: Dr. Freeman, do you recall submitting an amicus brief in a case involving LM, another minor?

A. Only vaguely.

Q. Do you need us to scroll down and show you the rest of this document?

A. No. If you represent to me that I

02:09:34 submitted an amicus belief, I believe that I had
02:09:36 done that. I just don't have a very clear
02:09:39 recollection of it.
02:09:40 **Q. Do you remember how many times you've**
02:09:42 **submitted an amicus brief?**
02:09:49 A. At least half a dozen.
02:09:51 **Q. And what were the subjects other than this**
02:09:55 **one which had to do with biomechanics?**
02:10:02 A. Well, I submitted an amicus brief about
02:10:05 biomechanics in another case that was actually taken
02:10:09 up by the Supreme Court in Washington. And I've
02:10:14 done it in an FDA action about a medical procedure.
02:10:19 And I've done it for something in Connecticut. I
02:10:26 don't remember what that was about. So I'd estimate
02:10:31 probably half a dozen times I've written amicus
02:10:34 briefs.
02:10:35 **Q. What was the medical procedure that you**
02:10:36 **wrote about?**
02:10:37 A. Mesenchymal stem cell -- expanded
02:10:47 mesenchymal stem cell therapy for orthopedic
02:10:50 applications.
02:10:56 **Q. What was the other case that went to the**
02:10:59 **Supreme Court?**
02:11:03 A. In Washington. I believe that was a
02:11:05 traffic crash case which involved a biomechanical

engineer.

Q. And what was the name of the case?

A. No idea.

Q. Who was the engineer that you were testifying about or submitting your brief about?

A. It might have been Dr. Allan Tencer in that case.

Q. This one was about Dr. Allan Tencer. Did you submit two amicus briefs regarding the testimony of Dr. Allan Tencer?

A. All I can tell you is that it might have been. The other one might have been about Dr. Tencer.

Q. Okay. Have you ever submitted an amicus brief on behalf of the defense in any case?

A. I don't think anyone's asked me. So if they haven't asked me, then I haven't done it.

Q. Who asked you to submit this amicus brief?

A. No idea.

Q. This case was -- the plaintiff was represented by Sim Osborn, the partner of Ms. Machler. Does that refresh your memory?

A. Well, it logically leads me to infer it was somebody from that firm that asked me to do it, but I don't have a recollection of it.

02:12:27 **Q. Do you know what the Supreme Court decided?**

02:12:35 A. No. I mean, I might have at one time, but

02:12:37 I certainly don't recall it.

02:12:42 **Q. Do you have an estimate of how many times**

02:12:44 **you have testified in a case opposite to Dr. Allan**

02:12:49 **Tencer?**

02:12:51 A. Well, I've certainly been retained more

02:12:54 than I've testified. I've probably testified over

02:12:56 the years -- and it's been some years -- oh, 15 to

02:13:05 20 cases, and I've probably had over 50 over the

02:13:08 years, or more than that maybe, including a case in

02:13:16 which I testified for the defense at trial and

02:13:21 Dr. Tencer was a plaintiff's expert, of all things.

02:13:24 **Q. Is that pretty unusual?**

02:13:27 A. I already told you what my percentage

02:13:29 breakdown is for testimony, so it would be certainly

02:13:32 less frequent.

02:13:34 **Q. Did you actually write this brief or was it**

02:13:37 **written by Mr. Osborn with your signature?**

02:13:42 A. That sort of action doesn't exist in my

02:13:44 practice. I don't let other people write down what

02:13:48 my thoughts are.

02:13:55 **Q. Let's scroll down to the first full page of**

02:14:00 **text on this one.**

02:14:07 **Actually, before we get to that, David**

02:14:10 **Heller is listed as the lawyer on the case. Do you**
02:14:17 **know who that is?**
02:14:20 A. Offhand I can't say. I mean, the name is
02:14:23 vaguely familiar. But no, I can't say that I could
02:14:27 tell you I know who that is.
02:14:30 **Q. Okay. Let's keep scrolling down to the**
02:14:35 **text.**
02:14:49 **All right. Now, here on looks like page 6**
02:14:54 **of the brief, at least PDF page 6, it says:**
02:15:03 **"Dr. Michael D. Freeman, MedDr, Ph.D.,**
02:15:07 **MPH, FAAFS, is, among other things, a**
02:15:12 **doctor of medicine and an epidemiologist."**
02:15:16 **And then it goes on. Now, you do not have**
02:15:21 **a medical doctor degree as understood in this**
02:15:25 **country. Correct?**
02:15:26 A. Well, I don't know how you think a medical
02:15:28 doctor degree is understood in this country. I have
02:15:32 a degree that is specifically designated a doctor of
02:15:35 medicine; however, it's not a clinical medical
02:15:38 degree. It's closer to a Ph.D. in medicine.
02:15:41 **Q. And you did not clarify that in your -- in**
02:15:44 **this brief, did you?**
02:15:47 A. What do you mean I didn't clarify it? I
02:15:49 said my degree is an MedDr. That is a medicine
02:15:54 doctor. It's from Sweden. It's from the Umea

University in Sweden. And by --

Q. It says "a doctor of medicine and an epidemiologist."

A. They're both correct.

Q. All right. Let's take this exhibit down.

And did you ever explore working as an epidemiologist outside of academia?

A. Yes. That's what I do.

Q. Did you ever explore working as an epidemiologist outside of forensics and academia?

A. No.

Q. Do you have any idea how much epidemiologists typically earn in those other areas if not forensics?

A. Broadly. I employ six epidemiologists in my practice, so I know what the prevailing wage is. And I'm a fellow of the American College of Epidemiology, so I certainly get information from the largest organization in the country that has epidemiologists as members.

Q. So what's the prevailing wage for epidemiologists other than those like yourself doing forensic testifying?

A. Oh, hell. I mean, I can't tell you that with any kind of degree of accuracy.

Epidemiologists typically start about 70,000 or 80,000 a year depending on their background and may go up to 300,000, 400,000, $500,000 a year.

Q. Would it surprise you to know that the Department of Labor statistics with the U.S. government put 90 percent of epidemiologists at about 130,000 a year?

A. No. That seems pretty consistent with what I just testified to.

Q. Let's pull up the subpoena tecum in this case. It's right above amicus jury i brief.

Oh, actually -- well, let's look at this while we're at it. And yeah. If we would make this bigger.

So Dr. Freeman, we're just clarifying that in response to the subpoena, that these articles were ones you provided along with two letters, one about medical records and one about -- it's actually Annette Hamilton Bleuler. And we can scroll down and see if there's anything else.

Other than what we've already talked about, is this everything you've reviewed?

A. I couldn't possibly tell you from looking at that list.

Q. Well, other than going through article by

02:20:17 **article, which we're not going to do, is there**
02:20:21 **anything else that's in your file?**
02:20:25 A. All I can tell you is just eyeballing what
02:20:27 you've listed there looks like what's in my file. I
02:20:31 just don't know if there's something that -- one
02:20:35 extra article that might be in my file or might not
02:20:38 be in my file. That I can't answer because
02:20:40 obviously I would have to go through the whole thing
02:20:43 carefully.
02:20:49 **Q. All right. Let's mark that the next number**
02:20:52 **and pull up the subpoena duces tecum next.**
02:20:58 THE VIDEOGRAPHER: Okay. Just to clarify for
02:20:59 the record, Counsel, did you want to mark this as an
02:21:02 exhibit as well or no?
02:21:04 MS. MONIZ: Yes.
02:21:05 THE VIDEOGRAPHER: So this will be Exhibit 6
02:21:06 then.
02:21:11 MS. MONIZ: Thank you.
02:21:11 (Whereupon Exhibit 6 was marked for
02:21:11 identification by the Court Reporter.)
02:21:12 THE VIDEOGRAPHER: Pulling up the subpoena.
02:21:16 MS. MONIZ: And it's marked SDT next to the
02:21:19 bottom.
02:21:19 (Whereupon Exhibit 7 was marked for
02:21:19 identification by the Court Reporter.)

02:21:23 **Q. BY MS. MONIZ: So let's scroll through this. Dr. Freeman, did you get the subpoena duces tecum in this case?**

02:21:31 A. I did.

02:21:36 **Q. And let's look at the list of documents. And you've provided us your curriculum vitae, which you've now supplemented during the deposition with the current one. Right?**

02:21:47 A. That is correct.

02:21:48 **Q. Now, under No. 2 it mentions emails. I didn't see any emails. Did you provide any of those?**

02:21:57 A. I don't have any emails in my file.

02:22:01 **Q. Do you have a practice of erasing emails on an automatic basis?**

02:22:06 A. Every week emails are sorted, and unless they have something substantive in them, they are deleted.

02:22:14 **Q. So even knowing that you're likely to be subpoenaed and asked for copies of emails, you automatically delete them all?**

02:22:28 A. If I'm under subpoena I don't.

02:22:31 **Q. So even knowing two years ago that you would be -- or three years ago that you would be eventually deposed in this case, you deleted all**

02:22:44 **emails regarding this case in advance of obtaining a**
02:22:51 **subpoena. Correct?**
02:22:54 A. No, that's incorrect.
02:22:57 **Q. Why is it incorrect?**
02:22:58 A. Because I don't delete all emails. I don't
02:23:01 keep emails that say "Here's a deposition
02:23:06 transcript" or "Here's a scheduling issue." I keep
02:23:10 substantive emails. If I have them, I always start
02:23:13 a correspondence file and that will be in my file.
02:23:16 I don't see one here. That means I don't have any
02:23:18 emails that are substantive. All other emails are
02:23:21 deleted.
02:23:22 **Q. And are those deletions automatic unless**
02:23:25 **you affirmatively designate them as substantive and**
02:23:28 **save them?**
02:23:32 A. Well, they're sorted. I mean, at the time
02:23:35 that they're received. If there's something
02:23:38 substantive in them, they're put in correspondence.
02:23:41 If there isn't, they're deleted, typically at the
02:23:44 time.
02:23:56 **Q. Okay. Let's scroll down to the last of**
02:23:58 **this list. Dr. Freeman, under No. 5, do you have**
02:24:04 **any additional documentation that we have not**
02:24:09 **already discussed?**
02:24:12 A. No.

02:24:14 **Q. Do you have any notes other than the**
02:24:16 **39-or-so-page notes that you supplied shortly before**
02:24:20 **the deposition started this morning?**
02:24:23 A. No.
02:24:25 **Q. How about any invoices? Do you have any**
02:24:28 **invoices or billing statements?**
02:24:31 A. I was just asking my assistant about that.
02:24:34 My understanding is I've billed about 20 hours in
02:24:37 this case, but I don't know what actually is on an
02:24:43 invoice. But I'll be happy to make sure I get you
02:24:47 the invoices.
02:24:50 **Q. Okay. Let's do a place holder for**
02:24:53 **Exhibit 7 for the invoices.**
02:25:13 THE COURT REPORTER: I think that would be
02:25:13 Exhibit 8.
02:25:13 MS. MONIZ: Okay.
02:25:13 THE COURT REPORTER: If the subpoena is
02:25:13 Exhibit 7, then it would be 8.
02:25:12 MS. MONIZ: Okay. Thank you.
02:25:13 (Per the witness after the deposition, no
02:25:13 invoices exist. Exhibit 8 was not attached.)
02:25:14 **Q. BY MS. MONIZ: So if you've billed about 20**
02:25:17 **hours, that would be what? About 18,000 or 19,000**
02:25:24 **so far?**
02:25:25 A. No. I charge 650 per hour for my review.

Or at least I was.

Q. Have you ever been a party to a lawsuit?

A. Sure.

Q. How many?

A. I don't know. A couple.

Q. Okay. Have you ever been a party to any lawsuit in which you were the plaintiff?

A. Probably a couple.

Q. And what were those in regard to?

A. I think it was business litigation primarily, and then there was a lawsuit from 30-odd years ago when I was a practicing chiropractor. It was like an unlawful trade practices thing that was dismissed and thrown out of court because it was clearly concocted.

Q. Well, let's take this one at a time. The couple of lawsuits where you were the plaintiff regarding business, who did you sue?

A. Oh, plaintiff. I'm sorry. I was thinking defendant. So the question about the second one, which was from 30-odd years ago, I was the defendant. And that case was thrown out of court.

I'm not sure if I've been a plaintiff in any cases. I'm not sure. There's been business litigation on, like, values of companies and that

kind of thing that I can recall. And I can't remember if I was plaintiff or defendant in them.

Q. What companies did they involve?

A. They were medical imaging companies.

Q. Do you remember the names of any of them?

A. No.

Q. You don't remember the names?

A. No, not really. They were a couple of decades ago.

Q. What county did they take place in?

A. No recollection.

Q. A couple of decades ago where were you living?

A. I think I was living in Oregon.

Q. What part of Oregon?

A. Salem.

THE COURT REPORTER: Counsel, just give me a minute. I just have to plug in. My battery is dying. I don't need a break. Just give me 30 seconds.

MS. MONIZ: Sure.

THE WITNESS: I do. It's a good time for me to take a break.

MS. MONIZ: All right. Let's take five minutes.

THE VIDEOGRAPHER: The time is 2:28 P.M. We're

02:28:26 off the record.

02:34:16 (Recess.)

02:34:26 THE VIDEOGRAPHER: The time is 2:34 P.M. We're back on the record.

02:34:31 **Q. BY MS. MONIZ: So just so I understand, your best memory as you sit here today is that you've been sued a couple of times over business matters, but you cannot remember the names of the companies involved or the location of the suit. Is that right?**

02:34:52 A. Not specifically, no.

02:34:54 **Q. Can you recall generally?**

02:34:57 A. No, outside of the fact that they were in Oregon.

02:34:59

02:35:07 **Q. There was also a trade practice lawsuit. That was over the Toftness device that was allegedly used by you and your father and was not approved?**

02:35:11

02:35:16

02:35:21 A. Well, if you have it the lawsuit that was thrown out of court. I can't tell you what all the allegations were or the nonsense that went on with it. Certainly it's not anything I ever had anything to do with it.

02:35:24

02:35:27

02:35:31

02:35:34

02:35:34 **Q. Did that case go to trial?**

02:35:36 A. Yes. And the verdict from the bench was overturned and the case was dismissed with

02:35:39

prejudice.

Q. So this was a judge trial, and the judge found against you and your father but the Court of Appeals reversed?

A. That's correct.

Q. Any other lawsuits that you were involved in either as a plaintiff or defendant?

A. I told you everything I can remember that comes to mind.

Q. In these half a dozen or so amicus briefs that you filed, did somebody pay you to write any of them?

A. I don't have any recollection of the circumstances of them so --

Q. Did you pay a lawyer to file them on your behalf?

A. I doubt it.

Q. But you don't remember?

A. I would seriously doubt it.

Q. What would your motivation be to file half a dozen amicus briefs?

A. You mean like why six and not five and why not seven? I mean, I just don't understand the question.

Q. Why file amicus briefs?

02:36:50 A. I assume because somebody asked me to.
02:36:57 **Q. But you don't remember if you were paid?**
02:37:01 A. I don't have any recollection of the
02:37:03 circumstances of them.
02:37:12 **Q. Have we generally reviewed the opinions you**
02:37:15 **plan to express in this case?**
02:37:16 A. I think we have.
02:37:18 **Q. Okay. Let's pull up a couple more**
02:37:24 **exhibits. And let's get the letter from Western**
02:37:36 **States Chiropractic College. We'll mark this I**
02:37:44 **think Exhibit 9.**
02:37:57 (Whereupon Exhibit 9 was marked for
02:37:57 identification by the Court Reporter.)
02:37:57 **Q. BY MS. MONIZ: Do you recognize this**
02:37:57 **letter?**
02:37:59 A. People have shown it to me. I don't have
02:37:59 any recollection from it that goes back to the date
02:37:59 that it was supposedly sent or was supposedly made.
02:38:03 My understanding is the school doesn't have a record
02:38:05 of it either.
02:38:08 **Q. Dr. Freeman, you have been asked about this**
02:38:11 **letter before, both in court and in depositions. Do**
02:38:15 **you deny that this letter at some point back in the**
02:38:19 **'80s was addressed to you?**
02:38:22 A. No. Exactly what I just said. I have no

recollection of this letter. I don't have any record of it. I don't have a recollection of what I got at the time. It's almost 40 years old. That's my answer.

Q. But you do agree that you were suspended from chiropractic school for claiming to do treatment on patients that you did not actually treat. Correct?

A. I think it was exams maybe. Maybe it was treatment. I don't recall. But yeah, I certainly was suspended from that school. It was a terrible school.

Q. All right. Let's take that one down.

And then I think there's at least one other exhibit I want to look at. And that would be -- actually, I think Mr. Rand was going to put up another one, the rebuttal article. So we can take that down. And would you go ahead and send that, Pierce. We'll mark that Exhibit 10.

(Whereupon Exhibit 10 was marked for identification by the Court Reporter.)

MS. MONIZ: All right. Let's go off the record for a minute.

THE VIDEOGRAPHER: The time is 2:40 P.M. We're off the record.

02:40:25 (Recess.)

02:43:06 THE VIDEOGRAPHER: The time is 2:43 P.M. We're back on the record.

02:43:13 **Q. BY MS. MONIZ: So we have another exhibit, which I think is going to be marked Exhibit 10. And this is a legal journal talking about the rebuttal expert, and the title of the section is -- well, it's Stern and Brown, the authors -- "Litigating Brain Injuries." Have you seen this document before?**

02:43:45 A. No.

02:43:54 **Q. Please scroll down a bit.**

02:44:01 **Some of your legal publications have been cited. Do you see that?**

02:44:08 A. No.

02:44:10 **Q. Okay. Look at the bottom of that full paragraph.**

02:44:22 A. That's not a legal document. That's a peer-reviewed scientific journal paper.

02:44:33 **Q. Have you been cited in this document, this publication?**

02:44:40 A. Well, the paper that's listed is a paper that I've written. It's not a legal document, however, or a legal paper. It is a medical paper or scientific medical paper.

02:44:52

02:44:56 **Q. Your reference is entitled "Forensic**
02:45:04 **Epidemiology, a Systemic (sic) Approach to**
02:45:08 **Probabilistic Determinations in Disputed Matters."**
02:45:11 **Correct?**
02:45:13 A. Not precisely. It's a systematic, not
02:45:17 systemic approach.
02:45:19 **Q. Thank you. And it's in the Journal of**
02:45:24 **Forensic Legal Medicine. Correct?**
02:45:27 A. Forensic and Legal Medicine. That's
02:45:29 correct.
02:45:31 **Q. Do you know these authors, Stern and Brown?**
02:45:37 A. Can I see the first names?
02:45:42 **Q. Can you scroll back up, please.**
02:45:49 A. I don't know who Jeff Brown is. I know who
02:45:52 Bruce Stern is. I've worked with him on cases
02:45:55 previously.
02:45:55 **Q. Have you worked with him on cases talking**
02:45:57 **about epidemiology?**
02:46:00 A. I don't recall. I can't remember the last
02:46:03 time I worked with him on a case.
02:46:05 **Q. But have you worked with him on brain**
02:46:07 **injury cases?**
02:46:08 A. Possibly.
02:46:08 **Q. Have you worked with him on more than one**
02:46:11 **case?**

A. Oh, probably. Probably at least two or three cases over the years.

Q. And where is he based?

A. My recollection is New Jersey.

Q. Did he talk with you about this article in this legal publication?

A. No. I've never heard anything about it.

Q. Okay. Let's take this exhibit down.

So Dr. Freeman, in your review of the studies we've talked about, did you find any evidence of anyone agreeing or disputing the following statement?

"When the tone of the baby is decreased, it makes the brachial plexus more vulnerable to injury."

A. You're asking me if that speculative comment was made in any of the papers I reviewed?

Q. Let me try my question again. In the studies you reviewed that are outlined in your notes in this case, did any study either prove or disprove the following statement?

"When the tone of the baby is decreased, it makes the brachial plexus more vulnerable to injury."

A. No. No study proved or disproved that

02:47:58 statement.

02:48:00 **Q. Thank you.**

02:48:07 **So I know we're running out of time here,**
02:48:09 **but let me just be sure I understand, that both**
02:48:14 **based on your review and based on the Court's order,**
02:48:18 **you are giving an epidemiological opinion regarding**
02:48:23 **the studies cited by the defense experts. Correct?**

02:48:32 A. I wouldn't necessarily characterize my
02:48:35 opinion as strictly epidemiologic, but I'm certainly
02:48:38 relying on epidemiologic principles in part in my
02:48:40 description of the papers. So --

02:48:42 **Q. And what other principles are you relying**
02:48:45 **on besides epidemiological principles?**

02:48:49 A. Well, scientific method and general
02:48:54 principles of forensic medicine and evaluation of
02:48:57 causation.

02:49:03 **Q. And your opinion basically is the natural**
02:49:07 **forces of labor can cause brachial plexus injuries.**
02:49:12 **Correct?**

02:49:13 A. That is correct.

02:49:14 **Q. And natural forces of labor can cause**
02:49:17 **permanent brachial plexus injuries. Correct?**

02:49:21 A. That's at least potentially true, yes.

02:49:23 **Q. And exogenous forces, including various**
02:49:30 **maneuvers, excess traction, forceps, and vacuum can**

02:49:36 **also cause brachial plexus injuries. True?**

02:49:40 A. They increase the risk of brachial plexus

02:49:41 injuries, yes.

02:49:44 **Q. And you would agree that just because an**

02:49:47 **injury is rare doesn't mean it doesn't occur**

02:49:50 **sometimes. Correct?**

02:49:52 A. Of course I do. I agree with that

02:49:53 completely.

02:49:55 **Q. And the actual clinical experience you have**

02:49:58 **in caring for patients was as a chiropractor.**

02:50:02 **Right?**

02:50:03 A. The actual clinical experience I have in

02:50:06 caring for patients is irrelevant to any of the

02:50:09 opinions that I've given in this case, is what I

02:50:12 would answer that with. But if you're asking about

02:50:15 in what circumstances I've been in a clinical

02:50:18 setting, I spent two years learning how to do

02:50:22 autopsies in Pittsburgh. I spent three years doing

02:50:25 medical school rotations. I spent 12 years working

02:50:29 as a chiropractor while I was doing my master's and

02:50:31 Ph.D. as well and also was working as a medical

02:50:34 school professor. So I've seen these things, but

02:50:38 none of those things have anything to do with my

02:50:41 opinion in this case. I'm in this case as a medical

02:50:45 scientist.

02:50:46 **Q. So you don't rely in any way on your**
02:50:49 **clinical experience, which you include doing**
02:50:53 **autopsies, to develop your opinions in this case.**
02:50:57 **Correct?**
02:50:58 A. Well, to understand some of the basic
02:51:00 concepts of obstetrics, understand what the
02:51:04 maneuvers are and that sort of thing, I have enough
02:51:07 of a background in those issues to not have to, you
02:51:09 know, look up what a Zavanelli procedure is. But a
02:51:12 lot of that also comes to me through my forensic
02:51:14 experience as well. But again, I'm not talking
02:51:17 about standard of care. I'm not talking about
02:51:19 clinical issues.
02:51:20 **Q. When you worked doing autopsy at the**
02:51:24 **Allegheny County coroner's office, who did you work**
02:51:29 **with?**
02:51:30 A. Dr. Carl Williams, the chief medical
02:51:33 examiner, and a bunch of the pathologists there.
02:51:36 But my program was supervised by Dr. -- Professor
02:51:38 Anders Erikson out of Umea because I followed up my
02:51:45 medical doctorate in forensic medicine.
02:51:58 **Q. As a chiropractor, to your recollection,**
02:52:03 **you never treated babies with brachial plexus**
02:52:06 **injuries. Correct?**
02:52:10 A. I think I've already answered that

question.

Q. Is that correct?

A. I think it's the same question you asked me at the beginning of the deposition, which is that I don't have clinical experience with brachial plexus injuries, certainly not as a chiropractic physician, and not in any of my approximately pediatric rotations. It's just not something that I have clinical experience with.

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

A. That's correct.

Q. Okay. Those are all my questions. Thank you.

MS. MACHLER: I have a couple questions.

EXAMINATION

BY MS. MACHLER:

Q. Dr. Freeman, you mentioned in the beginning of the deposition about your research and your papers. Can you describe those?

MS. MONIZ: I'm going to object as outside the scope of the Court's order. But of course you may answer.

02:53:15 MS. MACHLER: Well, Donna, you're setting up here a motion to exclude him on his qualifications, so I'm going to ask him about his qualifications.

02:53:23 **Q. So, Doctor, do you do research in your work?**

02:53:27 A. I do.

02:53:28 MS. MONIZ: Object to the form.

02:53:30 **Q. BY MS. MACHLER: What kind of research do you do?**

02:53:31 A. I do a wide range of research, including epidemiologic analysis of risk factors for various types of injuries.

02:53:41 **Q. And you've published papers?**

02:53:44 A. I've published peer-reviewed journal articles, over 100 abstracts, proceedings. Book chapters, et cetera, another about 120.

02:53:54 **Q. And those are -- your research and your papers, those involve the discipline of epidemiology. Is that right?**

02:54:05 A. Well, they include the discipline of epidemiology. I come from a very hybrid background, which includes a lot of experience and background in forensic medicine. So most of the things I write about now have some forensic bent to them.

02:54:25 **Q. And you were asked whether or not you're an**

02:54:27 **engineer. And you're not an engineer. Is that**
02:54:29 **correct?**
02:54:29 A. That's correct.
02:54:30 **Q. But have you testified before on the**
02:54:35 **subject of biomechanics?**
02:54:37 A. Yes. Biomechanics and engineering overlap.
02:54:43 But there's also -- people are experts in
02:54:46 biomechanics that aren't engineers. Even though I
02:54:50 have a background in engineering, I don't have a
02:54:52 degree in engineering.
02:54:53 **Q. And is the subject matter that Dr. Grimm**
02:54:56 **testified about in this case, is that -- does that**
02:54:59 **include biomechanics?**
02:55:01 A. It does.
02:55:02 **Q. And approximately how many times have you**
02:55:07 **had -- have you been approved or authorized or**
02:55:12 **whatever by a Court to testify in court in the field**
02:55:16 **of biomechanics?**
02:55:19 MS. MONIZ: Object to the form.
02:55:21 THE WITNESS: Multiple hundreds of times.
02:55:23 Probably 400 or 500 times in cases where I've been
02:55:26 offered. In fact, I think one of the cases that was
02:55:29 in federal court is actually mentioned in the
02:55:32 document that the defense showed me earlier which
02:55:35 was written by Mr. Stern.

02:55:38 **Q. BY MS. MACHLER: And you have -- you were**
02:55:44 **asked about work in -- you know, outside of -- as an**
02:55:48 **epidemiologist outside of academia. So can you tell**
02:55:57 **us more about the work that you've done as an**
02:56:02 **epidemiologist outside of academia?**
02:56:06 A. Well, I've done research and published.
02:56:08 And, of course, as a professor of epidemiology, I've
02:56:13 supervised Ph.D. students doing their different
02:56:17 other research. But my work in epidemiology is in
02:56:23 largely a forensic setting. And I deal with
02:56:26 afflictions of humankind in a forensic setting,
02:56:31 including very prominently deaths in custody and the
02:56:36 epidemiologic features of deaths in custody. And,
02:56:37 in fact, I'm a retained expert by the State of
02:56:41 Washington for the Attorney General in the
02:56:46 prosecution of police officers who -- an individual
02:56:51 died while he was in custody with them.
02:56:54 So it's quite wide ranging. I was an
02:56:57 expert in the George Floyd prosecution of Derek
02:56:59 Chauvin for the State of Minnesota. Again,
02:57:04 epidemiologic factors as they're applied in that
02:57:07 case to a homicide.
02:57:08 **Q. And don't you serve on some kind of -- a**
02:57:11 **death in custody, like a task force or something in**
02:57:14 **Maryland also?**

02:57:15 A. Yes. I'm one of six or seven international
02:57:20 experts that were brought into -- by the Maryland
02:57:25 Attorney General to serve as auditors or audit
02:57:32 designers of 17 years of deaths in custody in that
02:57:35 state.
02:57:37 **Q. Now -- and maybe you don't know this or**
02:57:43 **maybe you can't answer that, but we talked about --**
02:57:45 **you talked about the different papers that you**
02:57:48 **reviewed, that this is a review paper and this is an**
02:57:51 **opinion and this is a something else. And so among**
02:57:55 **the literature that you reviewed in this case, is**
02:57:59 **there like a hierarchy of medical literature in**
02:58:03 **terms of what's research and what's not?**
02:58:06 A. There is indeed.
02:58:08 **Q. Can you tell us about that?**
02:58:11 A. Well, what's called filtered studies are
02:58:14 considered level one, the highest form of evidence,
02:58:17 where an analysis that is used, a systemic approach
02:58:25 to go and look at every single paper that's been
02:58:28 published in an area and then grade the papers on
02:58:30 the quality of the papers and then pool the
02:58:32 information. So it's also a metanalysis in some
02:58:36 cases so that there is the strongest evidence. We
02:58:39 do that for like clinical guidelines. You know,
02:58:42 what's the best thing to do when there is good

02:58:45 evidence from randomized controlled trials.

02:58:49 The next level would be what's called

02:58:49 observational studies or some randomized controlled

02:58:55 trials. Randomized controlled trials can be level

02:58:55 one or level two. Observational studies, depending

02:58:56 on what you're looking at, are typically level two,

02:59:01 or they could be level one in some cases if they're

02:59:06 very well-designed observational studies.

02:59:09 What I mean by that is on a study of

02:59:14 brachial plexus injuries, for example, isn't going

02:59:16 to consist of giving children brachial plexus

02:59:18 injuries. You're not going to do a randomized

02:59:22 controlled trial of children to see what factors are

02:59:25 going to increase or decrease brachial plexus injury

02:59:28 risk. So you always have to look after the injury

02:59:31 has occurred. That's why it's called a

02:59:34 observational study rather than an experimental

02:59:37 study where you actually give some kids a brachial

02:59:40 plexus injury and you don't give other kids a

02:59:43 brachial plexus injury, which would, of course,

02:59:44 never be done.

02:59:46 So for a topic like this, the kind of large

02:59:49 observational study like the one that I talked about

02:59:52 that I published in 2017 and the one from -- oh, the

02:59:56 other one of the nationwide inpatient samples, those

are big studies and they're level one or level two. Smaller case series studies that are described, those are more level three. They might work at level two, but most of them are level three studies.

And then the opinion studies like the ones that Dr. DeMott authored, a lot of those would be down into the level four and level five evidence because they're theories which are worth investigating, but just proposing a theory and then repeating the theory as somehow proven in later studies doesn't get you any closer to proving a theory.

Q. And have you done, like, for example, a level one study? Have you done those in your career?

MS. MONIZ: Object to the form.

THE WITNESS: Yes, I have. There are multiple systemic reviews and metanalyses that are in my CV and the study that we did of the brachial plexus injuries, which was very unique because we looked at both maternal and neonatal characteristics, and the largest database that exists, as far as I know, in the world describing both of the records, baby and mom, and linking them together. That would be considered a level one study for the kind of studies

that we can do as far as observational studies go.

Q. BY MS. MACHLER: And then just generally what do epidemiologists do?

A. Well, epidemiology is the medicine of populations. So they don't treat patients and they don't diagnose patients. But everything else in medicine comes from epidemiology if you're talking about what's good for you, what's bad for you, what causes injuries, what doesn't cause injuries. That has to come from looking at populations. Anytime you're looking at a population, you're involving epidemiologic principles and which are typically taught broadly. I mean, they're going to be taught in medical school. Physicians should understand basic epidemiologic principles. But typically when you're talking about the kind of studies we're talking about here, epidemiologists are involved.

MS. MACHLER: I believe that's everything I have.

MS. MONIZ: I have a few follow-up questions.

FURTHER EXAMINATION

BY MS. MONIZ:

Q. Is it your testimony, Dr. Freeman, that all of Dr. DeMott's publications are opinion only?

03:02:35 A. I've not testified to that. No.

03:02:43 **Q. You were asked whether your opinions were**
03:02:46 **allowed in various courts. Have your opinions**
03:02:49 **sometimes been limited by courts?**

03:02:52 A. Yes. In about 1 percent or so of cases in
03:02:55 which there's an attempt to strike my testimony in
03:02:59 part or in whole is granted.

03:03:00 **Q. And so sometimes your testimony is excluded**
03:03:06 **entirely. Correct?**

03:03:07 A. Yes. It's very rare, but it does happen.

03:03:11 **Q. Do you consider yourself an expert in**
03:03:13 **bioengineering?**

03:03:16 A. I am an expert in biomechanics of injury or
03:03:21 injury biomechanics and have published extensively.
03:03:24 I've designed a faculty peer-reviewed curriculum and
03:03:30 course that I taught for 15 years at Oregon Health
03:03:33 and Science University School of Medicine. About a
03:03:36 third of the coursework was biomechanics of injury.
03:03:39 So yes, I'm definitely an expert in
03:03:41 biomechanics, and I've published extensively about
03:03:44 it. And I've been a consultant to NASA and to the
03:03:46 U.S. Congress on the topic of injury biomechanics.

03:03:48 **Q. How many courses have you taken in**
03:03:52 **biomechanics?**

03:03:57 A. Actual university courses, three or four

made up half of my Ph.D.

I do have to go. I've got to go to another testimony so --

Q. Well, I'm almost done here.

Just to clarify, you don't consider yourself an expert in biomechanical or biomedical engineering the way Dr. Grimm is. Correct?

A. No. Dr. Grimm has a degree in biomechanical or biomedical engineering. I don't have a degree in that. I just have expertise and experience in biomechanics. Her -- I mean, for example, I use the MADYMO program. That is something that is licensed to my practice. And I use it at the present time just for research. So I'm quite familiar with the tools that she used. But she has very -- she has a great deal of in-depth specific-to-engineering knowledge that I don't have. Because that's what engineering is. It's this very unique field. And there is this overlap of biomechanics as it enters a medical-legal arena where I do have knowledge and information, but it's very much sequestered to my little area.

Q. But you do not have a degree, graduate or undergraduate, in biomedical engineering. Correct?

A. Correct. I still have no degrees in

engineering.

MS. MONIZ: All right. Those are all my questions.

THE WITNESS: Okay. Got to go. Take care.

MS. MACHLER: Thank you, Doctor.

MS. MONIZ: Take care. Bye-bye.

THE COURT REPORTER: Donna, do you want this written up?

MS. MONIZ: Yes. I was going to say, do you have any spelling questions that I might be able to answer?

THE COURT REPORTER: Yeah. Two. I can ask you after we go off the record.

MS. MONIZ: Okay.

THE COURT REPORTER: And Ms. Machler, do you need a copy of this?

MS. MACHLER: Yes, please.

THE VIDEOGRAPHER: This concludes today's deposition of Dr. Michael D. Freeman. The time is 3:05 P.M. We're off the record.

(Proceedings concluded at 3:05 P.M.)

* * *

STATE OF WASHINGTON)

I declare under penalty of perjury under the laws of the State of Washington that I have read the foregoing transcript, I have made any corrections, additions or deletions that I was desirous of making in order to render the within transcript true and correct, and

In witness whereof, I have hereunto subscribed my name this _____ day of _____, 20_____.

_____
MICHAEL FREEMAN, MedDr., Ph.D.

ERRATA SHEET

PRINTED NAME _____ DATE _____

SIGNATURE _____

PAGE/LINE	CORRECTION	REASON

STATE OF WASHINGTON)

I, Laury Wasoff, Certified Shorthand Reporter No. 3506, Do Hereby Certify:

That prior to being examined, the witness named in the foregoing deposition was by me duly sworn to testify to the truth, the whole truth, and nothing but the truth;

That said deposition was taken down by me in shorthand at the time and place therein named and thereafter transcribed under my direction, and the same is a true, correct, and complete transcript of my shorthand notes so taken.

That if the foregoing pertains to the original transcript of a deposition in a federal case, before completion of the proceedings, review of the transcript {X} was { } was not requested.

I further certify that I am not in any way interested in the outcome of this action.

In witness whereof, I have hereunto subscribed my name this 10th day of May, 2022.

LAURY WASOFF, CSR NO. 3506, RPR

HEALTH INFORMATION PRIVACY & SECURITY: CAUTIONARY NOTICE

Litigation Services is committed to compliance with applicable federal and state laws and regulations ("Privacy Laws") governing the protection andsecurity of patient health information.Notice is herebygiven to all parties that transcripts of depositions and legal proceedings, and transcript exhibits, may contain patient health information that is protected from unauthorized access, use and disclosure by Privacy Laws. Litigation Services requires that access, maintenance, use, and disclosure (including but not limited to electronic database maintenance and access, storage, distribution/ dissemination and communication) of transcripts/exhibits containing patient information be performed in compliance with Privacy Laws. No transcript or exhibit containing protected patient health information may be further disclosed except as permitted by Privacy Laws. Litigation Services expects that all parties, parties' attorneys, and their HIPAA Business Associates and Subcontractors will make every reasonable effort to protect and secure patient health information, and to comply with applicable Privacy Law mandates, including but not limited to restrictions on access, storage, use, and disclosure (sharing) of transcripts and transcript exhibits, and applying "minimum necessary" standards where appropriate. It is recommended that your office review its policies regarding sharing of transcripts and exhibits - including access, storage, use, and disclosure - for compliance with Privacy Laws.

© All Rights Reserved. Litigation Services (rev. 6/1/2019)

Exhibit - H

973 N.E.2d 46
Court of Appeals of Indiana.

Ashley T. TUCKER, Appellant–Plaintiff,

v.

Michelle R. HARRISON, M.D., Appellee–Defendant.

No. 79A05–1108–CT–404.
|
Aug. 22, 2012.

Synopsis

Background: Patient brought medical malpractice action against physician, alleging physician's negligence in performing exploratory laparoscopic surgery damaged patient's ovaries and left her infertile. After jury trial, the Tippecanoe Superior Court, Thomas H. Busch, J., entered judgment in favor of physician. Patient appealed.

Holdings: The Court of Appeals, Robb, C.J., held that:

as a matter of apparent first impression, epidemiological testimony of expert witness as to probability that ovarian failure was caused by surgery performed by physician was not relevant and thus inadmissible;

trial court acted within its discretion in excluding evidence proffered by patient which alleged bias on part of every state physician in medical malpractice claims because the physicians were all participants in patient compensation fund; and

evidence did not support a res ipsa loquitur jury instruction.

Affirmed.

Attorneys and Law Firms

*47 Gloria J. Danielson, Daniel A. Ladendorf, Ladendorf & Ladendorf, Indianapolis, IN, Attorneys for Appellant.

Jon M. Pinnick, Schultz & Pogue, LLP, Indianapolis, IN, Attorney for Appellee.

OPINION

ROBB, Chief Judge.

Case Summary and Issues

Ashley Tucker filed a medical malpractice complaint against Dr. Michelle Harrison, alleging Dr. Harrison's negligence in performing a surgical procedure damaged her ovaries and left her infertile. A jury found in favor of Dr. Harrison and Tucker now appeals, raising three issues for our review: 1) whether the trial court abused its discretion in excluding testimony from one of Tucker's expert witnesses; 2) whether the trial court abused its discretion in denying Tucker the opportunity to question witnesses about possible financial bias; and 3) whether the trial court abused its discretion in refusing to give the jury a res ipsa loquitur instruction. Concluding the trial court did not abuse its discretion in excluding Tucker's expert testimony, *48 limiting her questioning of a witness about possible bias, or in instructing the jury, we affirm.

Facts and Procedural History

On October 1, 2004, Dr. Harrison, a physician with a specialty in obstetrics and gynecology, performed an exploratory laparoscopic surgery on then-twenty-year-old Tucker to try to determine the cause of Tucker's severe abdominal pain and cramping. Dr. Harrison was specifically looking for endometriosis or adhesions, but had also discussed with Tucker the possibility of finding ovarian cysts. Dr. Harrison and Tucker agreed that if cysts were determined to be the problem, Dr. Harrison would remove them during the procedure. Dr. Harrison did not find any endometriosis or adhesions during the exploratory surgery, but she did find a small cyst on each ovary. As there appeared to be no other cause for Tucker's pain, Dr. Harrison performed a bilateral ovarian cystectomy with monopolar electrocautery scissors, as she had in "hundreds" of other cystectomies. Transcript at 222. Dr. Harrison described nothing unusual during Tucker's surgery, and at a follow-up appointment approximately three weeks later, Tucker reported that she was feeling well and her pain had resolved. Several months later, Tucker learned that her ovaries had failed and she was permanently sterile.

Tucker filed a medical malpractice complaint against Dr. Harrison, alleging that Dr. Harrison was negligent in

performing the procedure and caused the ovarian failure. A medical review panel delivered a unanimous decision that Dr. Harrison did not breach the standard of care, and the case moved to the trial court. In May 2010, Tucker sent notice of her intention to serve non-party requests for production on the Indiana Patient's Compensation Fund, the Indiana State Medical Association, and each member of the medical review panel, seeking to uncover evidence of possible financial bias. Dr. Harrison objected and filed a motion to quash. Following a hearing, the trial court granted Dr. Harrison's motion to quash, finding that Tucker would not be allowed to question trial witnesses about financial bias of this nature and therefore the discovery would not lead to admissible evidence.

A multi-day jury trial began on July 18, 2011. Tucker tendered as evidence the videotape deposition of Dr. Michael Freeman, Ph.D., an epidemiologist, regarding the statistical probability that the surgery caused Tucker's injuries. On Harrison's motion, the trial court allowed the deposition to be read into the record, minus the probability testimony. At the conclusion of the testimony, Tucker requested the trial court give a res ipsa loquitur instruction to the jury. Dr. Harrison objected, and the trial court declined to give the instruction. The jury returned a verdict for Dr. Harrison and against Tucker. Tucker now appeals. Additional facts will be provided as necessary.

Discussion and Decision

I. Expert Witness Testimony

Tucker first contends the trial court erred in excluding the probability testimony of her expert witness, Dr. Freeman. Dr. Freeman is a forensic epidemiologist, which he described as "the scientific field that deals with populations of people and the kinds of injuries or diseases they get and what causes those injuries and diseases [...] doing statistical analysis of what you find in the populations in order to draw conclusions that are reliable." Tr. at 149. Dr. Freeman has a Ph.D. in public health and some medical training, although he is not a medical doctor. Dr. Freeman gave a deposition for purposes of trial that was read into the *49 record. Prior to doing so, Dr. Harrison objected to some of Dr. Freeman's testimony, and the trial court ordered that certain portions of Dr. Freeman's testimony were to be excluded. The trial court allowed Dr. Freeman's testimony that "one in seven hundred procedures every year done in women in [Tucker's] age group resulted in iatrogenic [1] ovarian failure," *id.* at 162, but excluded his testimony that one in 270,000 women in Tucker's age group who have not had the procedure suffer ovarian failure and thus,

> the risk of having this procedure versus the risk in an entire year that this condition would occur greatly favors the procedure. The procedure is far, far more likely, more than 99 percent more likely to be the cause of ovarian failure when it occurs after someone's had that procedure, rather than it occurring coincidentally and not due to the procedure.
> Appellant's Appendix at 143 (quoting from Dr. Freeman's complete deposition).

A. Standard of Review

The admissibility of an expert's testimony is governed by Evidence Rule 702, which provides:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
>
> (b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.

In order for a witness to qualify as an expert, "(1) the subject matter [must be] distinctly related to some scientific field, business or profession beyond the knowledge of the average lay person; and (2) the witness [must be] shown to have sufficient skill, knowledge or experience in that area so that the opinion will aid the trier of fact." *Bacher v. State*, 686 N.E.2d 791, 800 (Ind.1997). The proponent of expert testimony bears the burden of establishing the foundation and reliability of the scientific principles and tests upon which the expert's testimony is based. *McGrew v. State*, 682 N.E.2d 1289, 1290 (Ind.1997). Once the admissibility of the expert's opinion is established under Rule 702, "then the accuracy, consistency, and credibility of the expert's opinions may properly be left to vigorous cross-examination, presentation of contrary evidence, argument of counsel, and resolution by the trier of fact." *Bennett v. Richmond*, 960 N.E.2d 782, 786–87 (Ind.2012) (quotation omitted).

In determining whether expert testimony is reliable, the trial court acts as a "gatekeeper" to ensure that the expert's

testimony rests on a sufficiently reliable foundation and is relevant to the issue at hand so that it will assist the trier of fact. *Wallace v. Meadow Acres Manufactured Hous., Inc.*, 730 N.E.2d 809, 812 (Ind.Ct.App.2000), *trans. denied.* "When faced with a proffer of expert scientific testimony, the court must make a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue." *Hannan v. Pest Control Servs.*, 734 N.E.2d 674, 679 (Ind.Ct.App.2000), *trans. denied.* There is no specific test or set of factors which must be considered in order to satisfy Evidence Rule 702(b), but some relevant considerations include whether the theory or technique can be empirically tested, whether it has been subjected to peer review ***50** and publication, and whether it has gained widespread acceptance. *Id.* at 679–80. Ultimately, deciding whether expert testimony is admissible is a matter within the discretion of the trial court. *Wallace*, 730 N.E.2d at 812. We will reverse a trial court's decision to exclude evidence only if that decision "is clearly against the logic and effect of the facts and circumstances before the Court, or the reasonable, probable and actual deductions to be drawn therefrom." *Id.* (quotation omitted). We presume that the trial court's decision is correct, and the burden is on the party challenging the decision to persuade us that the trial court has abused its discretion. *Bennett*, 960 N.E.2d at 786.

B. Excluding Dr. Freeman's Testimony

Tucker contends the trial court abused its discretion in excluding Dr. Freeman's probability testimony about causation because Dr. Freeman satisfied all the requirements for offering his expert opinion. There seems to be no dispute that Dr. Freeman has sufficient education and experience in the field of epidemiology, a field beyond the knowledge of the average lay person. We therefore focus our discussion on whether his testimony is relevant to the issue at hand and would assist the trier of fact.

The elements of a medical malpractice case are that: (1) the physician owed a duty to the plaintiff; (2) the physician breached that duty; and (3) the breach proximately caused the plaintiff's injuries. *Cutter v. Herbst*, 945 N.E.2d 240, 247 (Ind.Ct.App.2011). The pertinent issue in this case is whether the surgery as performed by Dr. Harrison was a proximate cause of the ovarian failure and subsequent infertility suffered by Tucker. *See Singh v. Lyday*, 889 N.E.2d 342, 357 (Ind.Ct.App.2008) ("To hold a defendant liable for a plaintiff's injury, the defendant's act or omission must be deemed to be a proximate cause of that injury.") (internal quotation omitted), *trans. denied.*

The parties have not cited, and our research has not disclosed, any Indiana case directly addressing the admissibility of epidemiological evidence, in a medical malpractice case or otherwise. Tucker notes that epidemiological testimony has been accepted in litigation across the country, citing several cases from other jurisdictions, and urges that it be allowed here as well.[2] For instance, in *Mendes–Silva v. U.S.*, 980 F.2d 1482, 1485 (D.C.Cir.1993), the circuit court held epidemiological expert opinion testimony purporting to show a link between the plaintiff's encephalomyelitis and the combined administration of two vaccines on the same day was admissible ***51** and sufficient to withstand summary judgment in a federal tort claims action. The circuit court in *Ellis v. Int'l. Playtex, Inc.*, 745 F.2d 292, 305 (4th Cir.1984), held the district court committed reversible error in excluding as hearsay epidemiological studies indicating a statistically significant link between tampon use and Toxic Shock Syndrome in an action against a manufacturer alleging tampons caused the death of a user. *Accord Kehm v. Procter & Gamble Mfg. Co.*, 724 F.2d 613, 620 (8th Cir.1983) (holding epidemiological studies analyzing statistical relationship between tampon use and incidents of toxic shock syndrome were admissible testimony over a hearsay objection in products liability action). Though not using the word "epidemiology," several Indiana cases have considered the admissibility of expert testimony of causation in similar situations. *See Norfolk S. Ry. Co. v. Estate of Wagers*, 833 N.E.2d 93 (Ind.Ct.App.2005) (holding expert testimony that exposure to diesel fumes and asbestos at work played a significant role in decedent's lung cancer was admissible), *trans. denied; Hottinger v. Trugreen Corp.*, 665 N.E.2d 593 (Ind.Ct.App.1996) (holding expert testimony regarding correlation between plaintiff's injuries and herbicide exposure was admissible), *overruled on other grounds* by *Dow Chem. Co. v. Ebling ex rel. Ebling*, 753 N.E.2d 633 (Ind.2001).

None of these cases, however, are medical malpractice cases and they are therefore not directly applicable. As noted in *DeLuca v. Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941 (3d Cir.1990), which discussed epidemiological evidence of the statistical relationship between a morning sickness drug and birth defects, "[e]pidemiological studies do not provide direct evidence that a particular plaintiff was injured by exposure to a substance." *Id.* at 945. The instrumentality in the cited cases was the same for the entire statistical

population—administration of drugs, use of tampons, or exposure to a given substance—and the epidemiological studies were but circumstantial evidence of cause and effect. The question here, however, is not whether this type of surgery is associated with an increase in ovarian failure; the question is whether Dr. Harrison's negligence in performing the surgery caused Tucker's ovarian failure. *See id.* at 945 n. 6 ("Epidemiological evidence, like other generalized evidence, deals with categories of occurrences rather than particular individual occurrences. Epidemiological studies address questions such as 'Does exposure to this chemical increase the incidence of cancer in a population?' but not 'Did exposure to this chemical cause a particular person's cancer?' ") (quoting Dore, *A Commentary on the Use of Epidemiological Evidence in Demonstrating Cause–in–Fact,* 7 Harv. Envtl. L. Rev. 429, 436 (1983)).

Dr. Freeman's testimony was based upon a statistical analysis of a population of women aged eighteen to twenty-two who had "a procedure on the ovaries of any kind" in a period of time encompassing Tucker's surgery. Tr. at 162. He did not base his opinion upon any analysis of Tucker's physical condition or of Dr. Harrison's medical care. In fact, he testified that determining whether "any malpractice on the part of Dr. Harrison caused Ashley Tucker's ovarian failure" is "beyond the scope of what I do and beyond the scope of my expertise." *Id.* at 171. An expert in one field of expertise cannot offer opinions in other fields absent a requisite showing of competency in that other field. *Hannan,* 734 N.E.2d at 679. In *Bennett v. Richmond,* 960 N.E.2d 782, 789 (Ind.2012), a psychologist who personally evaluated the plaintiff in a personal injury case was qualified to offer his expert opinion that the plaintiff suffered a traumatic *52 brain injury as a result of a car accident despite not being a medical doctor, because he "clearly demonstrated" his knowledge and experience with traumatic brain injuries and his familiarity with the specific facts of the case. *Cf. Dan Cristiani Excavating Co., Inc. v. Money,* 941 N.E.2d 1072, 1080 (Ind.Ct.App.2011) (holding certified nurse life care planner was properly allowed to testify as an expert regarding the life care plan—a list of anticipated future health and medical needs and expenses over the plaintiff's remaining life expectancy as determined from her review of reports and opinions of physicians about the treatments, procedures, and care the plaintiff would require—because it was clear she was not offering a medical opinion about future treatment and her testimony was limited to her specific area of expertise).

Dr. Freeman is not a medical doctor. He may be qualified to offer a *mathematical* opinion, but he was not shown to be qualified to offer a *medical* opinion as to causation. Tucker is required to show that Dr. Harrison was the proximate cause of her injuries. Testimony establishing that the *fact* of a surgery makes ovarian failure more likely could mean that Dr. Harrison did everything right and ovarian failure is simply a risk of having any sort of ovarian surgery. It does not establish a causal relationship between Dr. Harrison's acts or omissions and Tucker's injury. Although probability testimony may be appropriate in certain circumstances, here, allowing Dr. Freeman to testify it was ninety-nine percent more likely that the surgery caused ovarian failure than that it was coincidence is not relevant to nor would it assist the jury in making the determination of whether Dr. Harrison's performance of the bilateral cystectomy caused Tucker's ovarian failure, and it runs the substantial risk of misleading the jury. *See* Ind. Evidence Rules 401 and 403 (relevant evidence has any tendency to make the existence of a fact is in issue more or less probably but may be excluded if its probative value is substantially outweighed by the danger of confusion of the issues or misleading the jury).[3]

In sum, Dr. Freeman may be qualified to offer expert epidemiological opinion testimony, but epidemiological testimony is not relevant to the issue of causation in this medical malpractice case and the trial court accordingly did not abuse its discretion in excluding part of his testimony.

II. Bias Testimony

Tucker contends the trial court erred in prohibiting her from questioning a witness about system-wide bias of qualified health providers in Indiana. Prior to trial, Tucker had sent notice of her intention to send non-party requests for production to various entities and individuals regarding "the inherent financial interest all of [Harrison's] expert witnesses have in the outcome of this case." Appellant's App. at 121. On Harrison's motion, the trial court quashed the requests, issuing the following order:

> ... The requests for production seek evidence concerning the five experts' payments into the Patient Compensation Fund and the rebates they have received from the Patient Compensation Fund. The purpose of the discovery requests is to show bias in that each of the witnesses allegedly has an interest in minimizing the payments from the Patient Compensation Fund so that their payments into the

Compensation Fund *53 are smaller or their rebates from the Compensation Fund are larger.

The Court finds this particular argument of bias would not be admitted into evidence and therefore that the discovery requests are not likely to lead to admissible evidence. The issue of whether any party has insurance may not be presented to the jury. Similarly, the issue of whether the experts, who are medical providers, have insurance cannot be presented to the jury because, by implication, it implies that the defendants, also medical providers, have insurance. Indiana has a statutory procedure for obtaining expert testimony in any such case through a medical review panel. This procedure benefits both parties by establishing a standard procedure for determining whether there is evidence supporting either party's position. While the opinion of the Medical Review Panel is not binding, it is useful to both plaintiff and defendants. Physicians are required to participate in panels. All physicians are required to obtain professional liability insurance.

The constitutionality of the medical malpractice laws has been regularly upheld over the course of several decades. Plaintiff's argument that a witness is biased because the witness is a participant in the Indiana Patient Compensation Fund is not a competent argument to present to the jury.

Id. at 134–35.

At trial, Tucker called Dr. David McLaughlin, a gynecologist, as an expert witness. Dr. McLaughlin first testified to his review of Tucker's medical files and his opinion of Dr. Harrison's performance of the surgery. Tucker's counsel then asked him if he had served on medical review panels before, which he had, and whether it was true that medical review panelists "don't have any bias." Tr. at 35. Harrison objected and the following discussion occurred out of the jury's presence:

[Harrison's counsel]: ... [Dr. McLaughlin's] service on panels is completely irrelevant to this case. It's not the three doctors that served on this panel. He doesn't know whether the doctors in this case were biased or not and this is absolutely irrelevant and unduly prejudicial.

[Tucker's counsel]: [Harrison's counsel] told the jury that these were unbiased panel members and if allowed Dr. McLaughlin will say that every doctor in Indiana has a bias on the medical review panels....

* * *

[The Court]: I'm going to sustain the objection. This is an area—it's an issue that you raised that I've ruled on is not to be before the jury and I'll tell the jury to disregard the question....

[Tucker's counsel]: Well, yeah, I probably should make an offer to prove then.

[The Court]: Okay.

* * *

[Tucker's counsel]: ... As I said before his answer would have been that, yes, every doctor in Indiana does have an interest and are biased.... If allowed to testify Dr. McLaughlin will testify that there is a financial interest in that the physicians [sic] surcharges go down as a result of less payouts than are intended. That is an actuarial thing that's done every year. He didn't discuss that (inaudible) probably doesn't know, but he does know and he will answer, if he was allowed to testify that that is an effort by the physicians in Indiana to keep these—to keep the recoveries down so that their surcharges will go down.

Id. at 35–38. Tucker contends the trial court erred in excluding this evidence from the jury's consideration.

*54 Essentially, Tucker's proffered evidence alleges bias on the part of every Indiana physician because they are all participants in the Patient's Compensation Fund, which acts as a sort of supplemental mutual insurance provider for all qualified health care providers licensed in Indiana, and therefore have a financial interest in whether payouts are made from the Fund. Indiana Evidence Rule 411 provides:

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

The purpose of Rule 411 is "to prevent juries from inferring fault or calculating damages based on parties' liability coverage or lack thereof." *Spaulding v. Harris*, 914 N.E.2d 820, 830 (Ind.Ct.App.2009), *trans. denied.* Although Rule 411 generally bars insurance evidence, it may be admitted for some purpose other than implying fault or influencing a damage award. *Id.* "If the evidence is offered for a purpose not prohibited by Rule 411, admissibility is governed by the balancing test of Rule 403, and exclusion may

be appropriate if the fact to be proven is not in genuine dispute." *Id.* (quotation and citation omitted). Evidence Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." Rulings concerning the relevancy of evidence are within the trial court's discretion and we will not disturb such rulings unless they are clearly erroneous. *Wineinger v. Ellis*, 855 N.E.2d 614, 618 (Ind.Ct.App.2006), *trans. denied.*

We begin with a brief overview of the obligations of doctors with respect to the Patient's Compensation Fund and medical review panels. Any amount due from a medical malpractice judgment or settlement in excess of the total liability of all liable health care providers is paid from the Patient's Compensation Fund, up to the statutory limit. Ind.Code § 34–18–14–3. The Patient's Compensation Fund is funded by an annual surcharge levied on all qualified health care providers in Indiana. Ind.Code § 34–18–5–1. "The amount of the surcharge shall be determined based upon actuarial principles and actuarial studies and must be adequate for the payment of claims and expenses from the patient's compensation fund." Ind.Code § 34–18–5–2(c). The minimum annual surcharge is $100, and is to be determined not later than July 1 of each year. Ind.Code § 34–18–5–2(e), (f). The Indiana Medical Malpractice Act provides a mechanism by which medical malpractice complaints are first considered by a medical review panel. The panel is comprised of one attorney and three health care providers. Ind.Code § 34–18–10–3. "[A]ll health care providers in Indiana ... who hold a license to practice in their profession shall be available for selection as members of the medical review panel." Ind.Code § 34–18–10–5. A health care provider may only be relieved from serving on a panel by serving an affidavit on the panel chairman setting out facts showing that service "would constitute an unreasonable burden or undue hardship." Ind.Code § 34–18–10–12(c). Each member of the panel is required to take an oath in writing that, among other things, he or she will "render my opinion without bias[.]" Ind.Code § 34–18–10–17(e). Tucker contends that because all doctors participate in the Patient's Compensation Fund, all doctors have a financial interest ***55** in the outcome of every medical malpractice case in order to keep their annual surcharges to a minimum, and therefore, the members of the medical review panel were biased against Tucker's claim, evidence of which is relevant and not unduly prejudicial. We disagree.

Any specific bias on the part of the three members of the medical review panel in this case would certainly be relevant. *See* Ind. Evidence Rule 616 ("For the purpose of attacking the credibility of a witness, evidence of bias ... of the witness for or against any party to the case is admissible."). Each member of the review panel signed the required oath. Dr. Michelle Murphy, one of the review panel members, testified at trial that she signed the oath, that she took the oath seriously, and that she had no bias for either Tucker or Dr. Harrison when she considered the evidence and gave her opinion. Tr. at 79–80. Dr. Margaret Miser, also a member of the review panel, also testified that she took the oath, honored it, and complied with it in her work on the review panel. *Id.* at 364–65.

Despite Tucker's contention that she was prohibited from countering this evidence that the medical review panel doctors were unbiased, *see* Brief of Appellant at 18, Tucker's proffered evidence does not directly contradict this testimony. It does not allege specific bias on the part of the specific expert witnesses involved in this trial; it alleges system-wide bias, which runs the risk of confusing the issues and misleading the jury without adding any probative evidence to the question of whether or not Dr. Harrison was negligent. Tucker's proffered evidence merely speculates through Dr. McLaughlin's expected testimony that every doctor in Indiana—all of whom are required by law to participate in the Patient's Compensation Fund and to serve as review panel members-have such an interest in limiting their financial exposure by limiting payouts from the Patient's Compensation Fund that they would render opinions based on such interest. However, Tucker has not shown that Dr. McLaughlin is qualified to testify about system-wide bias, if any exists, and she offers no evidence of the amount of the financial exposure doctors allegedly face from which the likelihood of such skewed opinions could be assessed. By statute, the financial exposure could be as little as $100 per year. *See* Ind.Code § 34–18–5–2(e).

When balanced against the prejudicial effect of allowing evidence of professional liability insurance, the potential for bias in this case is so remote as to warrant exclusion. *See Wallace v. Leedhanachoke*, 949 S.W.2d 624, 628 (Ky.Ct.App.1996) (after reviewing cases from numerous jurisdictions, agreeing with the majority that the "mere fact that two physicians shared a common insurance carrier—absent a more compelling degree of connection—does not clearly evince bias by the expert, and its arguable relevance or probative value is insufficient to outweigh the well-

established rule as to the inadmissibility of evidence as to the existence of insurance."). The trial court did not clearly err in excluding the proffered bias testimony.

III. Res Ipsa Loquitur Instruction

Tucker also contends the trial court erred in refusing to give her proposed jury instruction regarding res ipsa loquitur:

> You may assume that an act of medical negligence took place if Plaintiff Ashley Tucker proves the following by the greater weight of the evidence:
>
> (1) Plaintiff was under Dr. Harrison's care when the harm occurred;
>
> (2) Dr. Harrison had exclusive control of Plaintiff Ashley Tucker's actions or reactions when the harm occurred;
>
> *56 (3) the harm was of a kind that would not have occurred unless an act of medical negligence took place; and
>
> (4) Defendant Dr. Harrison had exclusive control of the instrument which caused the harm.
>
> If you conclude that an act of medical negligence took place, you must then consider that fact with all other evidence in deciding whether [defendant] was liable.

Brief of Appellant at 20.[4] Dr. Harrison objected, specifically to the lack of evidence supporting element three. The trial court found that res ipsa loquitur "does not apply to the facts of this case" and declined to give the instruction. Tr. at 327.

The decision to give or deny a tendered jury instruction is largely left to the sound discretion of the trial court. *St. Mary's Med. Ctr. of Evansville, Inc. v. Loomis*, 783 N.E.2d 274, 282 (Ind.Ct.App.2002). We review the trial court's decision only for an abuse of that discretion. *Johnson v. Wait*, 947 N.E.2d 951, 957–58 (Ind.Ct.App.2011), *trans. denied*. On review, we will reverse the trial court's refusal to give a tendered instruction when the instruction is a correct statement of the law; it is supported by the evidence; and it does not repeat material already covered by other instructions. *Id.* at 958.

The doctrine of res ipsa loquitur is an exception to the general rule that the mere fact of an injury will not create an inference of negligence. *Syfu v. Quinn*, 826 N.E.2d 699, 703 (Ind.Ct.App.2005). Res ipsa loquitur is a rule of evidence which allows an inference of negligence to be drawn based on the facts and circumstances of the injury. *Johnson*, 947 N.E.2d at 960. The doctrine may be applied and negligence inferred when the plaintiff establishes that the injuring instrumentality was within the defendant's exclusive management and control and the accident is of a type that does not ordinarily happen if those who have the management and control exercise proper care. *Ross v. Olson*, 825 N.E.2d 890, 893 (Ind.Ct.App.2005), *trans. denied*. In determining if the doctrine is applicable, the question is whether the incident more probably resulted from the defendant's negligence than from another cause. *Rector v. Oliver*, 809 N.E.2d 887, 890 (Ind.Ct.App.2004), *trans. denied*. The plaintiff may show, by common knowledge or expert testimony, that the injury is one that would not ordinarily occur in the absence of due care on the part of those controlling the instrumentality. *Ross*, 825 N.E.2d at 894.

As our supreme court has explained:

> [T]here are some situations in which a physician defendant's allegedly negligent act or omission is so obvious as to allow plaintiffs to rely on the doctrine of res ipsa loquitur. Juries do not need an expert to help them conclude, say, that it is malpractice to operate by mistake on the wrong limb ...

Wright v. Carter, 622 N.E.2d 170, 171 (Ind.1993). Thus, our appellate courts have found res ipsa loquitur applied when a patient's oxygen mask caught fire during surgery, *see Cleary v. Manning*, 884 N.E.2d 335, 339 (Ind.Ct.App.2008), *Gold v. Ishak*, 720 N.E.2d 1175, 1184 (Ind.Ct.App.1999), *trans. denied*; or when foreign objects are left in the body following surgery, *see Wright*, 622 N.E.2d at 172 (wire left in breast following biopsy); *see also Ziobron* *57 *v. Squires*, 907 N.E.2d 118, 126–27 (Ind.Ct.App.2008) (citing similar cases).

> Application of this exception in such cases is appropriate when limited to situations in which the complained-of conduct is so obviously substandard that one need not possess medical expertise in order to recognize the breach. It is otherwise when the question involves the delicate inter-relationship between a particular medical procedure and the causative effect of that procedure upon a given patient's structure, endurance, biological makeup, and pathology.

Malooley v. McIntyre, 597 N.E.2d 314, 318 (Ind.Ct.App.1992). As the trial court found, this case is one of the latter.

Tucker's ovarian failure and subsequent infertility is not a situation that jurors could look at and know from common

experience was obviously caused by substandard conduct. The expert witnesses disagreed as to whether the laparoscopic surgery Dr. Harrison performed with monopolar scissors was the cause of Tucker's ovarian failure. The medical review panelists opined during the review process as well as testified during trial that Dr. Harrison was not the cause of the ovarian failure. *See* Tr. at 61 (Dr. Murphy, medical review panelist, testifying that in her opinion, ovarian failure following the surgery was a coincidence); *id.* at 397 (Dr. Miser, medical review panelist, testifying that in her opinion, Tucker had been in ovarian failure prior to the surgery masked by her use of birth control pills and Dr. Harrison did not cause the ovarian failure). Tucker's experts Dr. McLaughlin and Dr. Denniz Zolnoun each testified that Tucker's ovarian failure was caused by Dr. Harrison's negligence in performing the cystectomy. Dr. McLaughlin also testified, however, that destruction of the ovaries through electrosurgery is a possible risk, although "a really rare risk," of a cystectomy even if it is done properly. *Id.* at 24; *see also id.* at 202 (Dr. Harrison testifying that infertility was not a high risk of the surgery). On this evidence, it cannot be said that Tucker's injury was one that would not have occurred in the absence of negligence.

As the trial court stated in rejecting the res ipsa loquitur instruction: "the contentions are harm occurred during surgery, harm did not occur during surgery, harm occurred independently of surgery. I don't think that's a res ipsa loquitur case." *Id.* at 327. From the expert testimony presented, the jury could have drawn an inference that Tucker suffered harm because Dr. Harrison was negligent, or it could have drawn an inference that Tucker suffered harm even though Dr. Harrison exercised the appropriate standard of care and skill.

Accordingly, Tucker was not entitled to a res ipsa loquitur instruction and the trial court did not abuse its discretion in denying the tendered instruction.

Conclusion

The trial court did not abuse its discretion in excluding Tucker's expert epidemiological probability testimony, in excluding testimony concerning system-wide bias, or in instructing the jury. Accordingly, the judgment for Dr. Harrison is affirmed.

Affirmed.

BAILEY, J., and MATHIAS, J., concur.

All Citations

973 N.E.2d 46

Footnotes

1 "Iatrogenic" means "as a result of the procedure." Tr. at 162.

2 *Lee v. A.C. & S. Co., Inc.*, 542 A.2d 352 (Del.Super.Ct.1987), provides the following excellent description of epidemiology, particularly in reference to its use in the legal context:

> Epidemiology has been defined as:
>
> > The science of dealing with the occurrence and distribution of diseases, especially of epidemic and endemic diseases.
>
> It is also defined as:
>
> > The field of science dealing with the relationships of the various factors which determine the frequencies and distributions of an infectious process, a disease, or a physiological state in a human community.
>
> Hence, a person who testifies as an expert in epidemiology provides information concerning the frequency and distribution of the occurrence of a particular disease or malady. The focus of the expertise is upon the frequency in which a particular disease is likely to occur within a segment of the population who have lived under a particular condition. The epidemiologist's function does not extend to determination of the physical condition or symptoms of an individual.

Id. at 354 (citations omitted).

3 This is not to say epidemiological evidence is *irrelevant* and could never be admitted in a medical malpractice case. In the appropriate case, it could certainly bolster other testimony of medical causation, but it does not replace it.

4 This instruction is reproduced as it appears in Tucker's brief. It appears without citation to the record.

End of Document

© 2022 Thomson Reuters. No claim to original U.S. Government Works.

Exhibit – I

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

SCOTT HAMILTON, as guardian ad litem for Z.H., Plaintiffs, v. LINDA AMONDSON-MULLER, Personal Representative of the ESTATE of LAURA HAMILTON, Defendants.	NO. 20-2-00543-21 DEFENDANT HAMILTON'S DISCLOSURE OF POSSIBLE FACT AND EXPERT WITNESSES

COMES NOW Defendant Linda Amondson-Muller, Personal Representative of the Estate of Laura Hamilton (hereinafter "Defendant"), by and through her attorneys of record, Donna M. Moniz and Johnson, Graffe, Keay, Moniz & Wick, LLP, and hereby submits the following list of primary witnesses, including expert witnesses who have been consulted for the purposes of review of their case. Discovery is ongoing in this case, so this disclosure is based on information known to date. This Defendant reserves the right to add additional witnesses as discovery continues and as additional witnesses are identified by any part.

I. FACT WITNESSES

1. Laura Hamilton (deposition testimony)
2. Seng Hamilton
3. Scott Hamilton

Johnson Graffe Keay Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

4. JoAnn Hamilton
5. Annette Livingston Bleuler
6. Amy Schofield – friend of Seng Hamilton, present at birth of Z.H.
7. Cheryl White Common – friend of Seng Hamilton, present at birth of Z.H.
8. Hussein Karmali
9. Erin Livingston
10. Lilly Gress
11. Lacey Gress
12. Khamsome Damneum
13. Setsamay Vietsing
14. Ray Wasson
15. Margaret's Care A Lot (employees or representatives)
16. Dells Daycare Center (employees or representatives)
17. Ford's Prairie Elementary School (employees or representatives)
18. Oakview Elementary (employees or representatives, including Autumn Gunsolley)

Defendant further reserves the right to call any fact witnesses disclosed by Plaintiffs, and any of Plaintiffs' health care providers regarding their care and treatment, regardless of whether they may be called in the case-in-chief of any other party.

III. TREATING HEALTHCARE PROVIDERS

Defendant reserves the right to call any treating providers listed by the Plaintiffs in their disclosures and/or in the medical records or discovery responses. Defendant presently may call at trial, as necessary after the Plaintiffs' case-in-chief has concluded, the following treating providers:

1. Isaac S. Pope, MD
2. Valley View Health Center

Johnson Graffe Keay Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

3. Centralia Providence Hospital (including but not limited to Andrew Nguyen, Rachelle Peterson, and Sheryl Dean)

4. Seattle Children's Hospital (including Janine Hottovy, OTR)

VI. CONSULTING EXPERT WITNESSES

1. Mark S. Scher, M.D.
University Hospitals Case Medical Center
11100 Euclid Avenue
Cleveland, OH 44106

Mark S. Scher, M.D. is a pediatric neurologist with extensive experience in fetal-neonatal neurology. Dr. Scher reviewed the medical records regarding Seng Hamilton and Zachary Hamilton from Laura Hamilton and medical records regarding Zachary Hamilton from Seattle Children's Hospital, Providence Centralia Hospital, and Valley View Health Center. He has also reviewed the deposition transcripts of Annette Livingston Bleuler, Scott Hamilton, Seng Hamilton, and Lorne Label, M.D.

Dr. Scher will testify regarding causation and damages. He will testify that, more probably than not, Z.H.'s injury was caused by the natural vertical forces of labor during the second stage of labor. He is expected to testify that in this case the affected arm was on the right. Since the delivery was right occiput anterior (ROA), the right arm was posterior. Thus, there was a different mechanism for injury as compared to the anterior arm, which becomes caught on the symphysis pubis. In cases of brachial plexus injury when presentation is ROA (as with this presentation for Z. H.), the posterior arm is caught higher in the vaginal tract on the sacral promontory. As such, the injury occurs earlier in the labor process, more probably than not before the shoulder dystocia even occurred and was clinically detected.

Johnson Graffe Keay
Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

In addition, Z.H. had an Apgar score of 6 at 1 minute, including a lower muscle tone score reflecting transient hypotonia noted after delivery. This score of lower tone reflects previously experienced periods of fetal hypotonia during uterine contractions in the second stage of labor. Transient hypotonia during labor is expected as a physiologic response that relaxes the child in order to tolerate stretching of his shoulder girdle tissues including his right brachial plexus to facilitate descent and eventual expulsion through the vaginal introitus. Dr. Scher will explain that an excessive degree of lower tone resulted in excessive stretching of Z. H.'s shoulder girdle including all components of his brachial plexus nerves beyond the limits of tissue elasticity. When considered in conjunction with the ROA presentation, Dr. Scher is expected to explain that Z.H.'s Apgar score further indicates that, more probably than not, the brachial plexus injury occurred prior to the shoulder dystocia and was the product of the natural vertical forces of labor.

Dr. Scher is further expected to explain that if a child sustains a permanent brachial plexus injury during birth, more probably than not, there were anatomical variations of the brachial plexus of the child and the mother's tissues associated with her vaginal tract that placed the child at increased risk for this injury. For the vast majority of neonates and mothers, anatomical variations offer protection against injury given the variable ways children descend during the second stage of labor as mother's vaginal tract adapts to her child's descent. In this case, more probably than not, there was a confluence of factors making the tissue of Z.H.'s components of his brachial plexus and mother's vaginal/supportive structures more vulnerable. His ROA presentation, excessive degree of hypotonia during uterine contractions in the second stage, and, most probably, some form of anatomical variations of fetal brachial plexus and maternal vaginal anatomy increased the risk of brachial plexus injury.

As to damages, Dr. Scher is expected to describe studies which follow children into adulthood who experienced brachial plexus injuries as well as those with abnormal

Johnson Graffe Keay
Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

congenital amputations. These children generally experience positive outcomes with a good quality of life. Dr. Scher is expected to testify that as long as Z.H. is offered developmental support by family and healthcare providers he will, more probably than not, experience sufficient functional improvements to be employable in a wide variety of different jobs. With this support, he will mature into adulthood as a well-balanced and successful person with a good quality of life. Dr. Scher is also expected to testify about the pertinent medical literature regarding research pertaining to brachial plexus injuries during labor and outcome. Such literature may include but is not limited to the following:

- Devon I. Rubin, "Disease of the Plexus", Continuum: Lifelong Learning in Neurology, 2008; 14(3): 156-179.
- Daniel T. Alfonso, MD, "Causes of Neonatal Brachial Plexus Palsy", Bulletin NYU Hospital for Joint Diseases, 2011; 69(1): 11-16.
- Holly B. Hale, MD, et al., "Current Concepts in the Management of Brachial Plexus Birth Palsy" JHS, Feb 2010; 35(A): 322-331.
- Jennifer M. Walsh, et al., "Neonatal brachial plexus injury: comparison of incidence and antecedents between 2 decades", American Journal of Obstetrics and Gynecology, April 2011; 204(324): e1-6.
- Lynda J.-S. Yang, MD, PhD, "Neonatal brachial plexus palsy – Management and prognostic factors", Seminars in Perinatology, 2014; 38(222-234).
- Oskar C. Aszmann, et al., "Bionic reconstruction to restore hand function after brachial plexus injury: a case series of three patients", The Lancet, Published online February 25, 2015 at http://dx.doi.org/10.1016/.S0140-6736(14)61776-1.
- American College of Obstetricians and Gynecologists report on "Neonatal Brachial Plexus Palsy", 2014.
- Cohain, JS "Management of True shoulder dystocia at attended homebirth", Midwifery Today 2012 Autumn; (103):28-29, 69.
- Beall MH, Spong C, McKay J, Ross MG. "Objective definition of shoulder dystocia: a prospective evaluation." Am J. Obstet Gynecol Oct 1998; 179(4):934.
- Christoffersson M, Rydhstroem H, "Shoulder dystocia and brachial plexus injury: a population-based study." Gynecol Obstet Invest. 2002; 53(1):42-47.

Johnson Graffe Keay Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

- Hankins, Gardy D. et al "Cesarean Section on Request at 39 Weeks: Impact on Shoulder Dystocia, Fetal Trauma, Neonatal Encephalopathy, and Intrauterine Fetal Demise." Semin Perinatol. 2006; 30(5): 276-287.
- Iskender, Cantekin, et al "Neonatal Injury at Cephalic Vaginal Delivery: A Retrospective Analysis of Extent of Association with Shoulder Dystocia." PLoS One. 2014 Aug 21; 9(8); e104765.
- Gherman RB, et al "Obstetric maneuvers for shoulder dystocia and associated fetal morbidity" Am J Obstet Gynecol, 1998 Jun: 178(6): 1126-30.
- Gherman RB et al. "The McRoberts Maneuver for the alleviation of shoulder dystocia: how successful is it?" Am J Obstet Gynecol 1997 Mar: 176(3):656-61.
- Choi PD, et al "Quality of life and function outcome following brachial plexus injury." J Hand Surg Am. 1997 Jul; 22(4):605-12.
- Johnson EO, Vekris M, Demesticha T, Soucacos PN, Neuroanatomy of the brachial plexus: normal and variant anatomy of its formation. Surgical Radiol Anat (2010) 32:291-291.
- Wozniak J, Kedzia A, Dudek K, Mathematical Models of Brachial Plexus Development During the Fetal Period: Clinical Aspects. Adv Clin Exp Med (2012), 21,2, 151-167.
- Wozniak J, Kedzia A, Dudek K, Brachial plexus variations during the fetal period. Anat Sci Int (2012) 87:223-233.
- Bowen BC, Pattany PM, Saraf-Lavi E, Maravilla KR, The brachial plexus: normal anatomy, pathology, and MR imaging. Neuroimag Clin N Am (2004) 14, 59-85.
- Hulleberg G, Elvrum AKG, Brandal M, Vik T, Outcome in adolescence of brachial plexus birth palsy. Acta Orthopaedica (2014), 85:6, 633-640.
- Ouzounian JG, Korst LM, Phelan JP, Permanent Erb Palsy: A Traction-Related Injury? Obstetrics & Gynecology, Vol 89 (1), January 1997, p.139-141.
- Jennett RJ, Tarby TJ, Krauss RL, Erb's palsy contrasted with Klumpke's and total palsy: Different mechanisms are involved. Am J Ostet Gynecol June 2002, Vol 186(6), p.1216-1220.
- Hoffman MK, Bailit JL, Branch DW, et al., A Comparison of Obstetric Maneuvers for the Acute Management of Shoulder Dystocia. Obstetrics and Gynecology June 2011, Vol 117(6), p. 1272-1278.

Johnson Graffe Keay Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

- Hankins GDV, Clark SL, Brachail Plexus Palsy Involving the Posterior Shoulder at Spontaneous Vaginal Delivery. Amercian Journal of Perinatatology January 1995, Vol 12(1), p. 44-45.

- Gherman RB, Ousounian JG, Chauhan S, Posterior Arm Shoulder Dystocia Alleviated by the Zavanelli Maneuver. Amercian Journal of Perinatatology 2010, Vol 27(9), p. 749-51.

- Chauhan SP, Blackwell SB, Ananth CV, Neonatal brachial plexus palsy: Incidence, prevalence, and temporal trends. Seminars in Perinatology 38 (2014) 210-218.

- Benjamin K, Part 1. Injuries to the Brachial Plexus: Mechanisms of Injury and Identification of Risk Factors. Advances in Neonatal Care August 2005, Vol.5(4), p.181-189.

- Gonik B, Walker A, Grimm M; Mathematic modeling of forces associated with shoulder dystocia: A comparison of endogenous and exogenous sources. Am J Obstet Gynecol. March 2000 Vol. 182, No. 3, 689-691.

- Pearn J, Obstetrical Sequelae of Fetal Hypotonia and Paresis. Aust. N.Z.J. Obstet. Gynaec. (1977) 17:201-204.

- Lear CA, Galinsky R, Wassink G, at al., The myths and physiology surrounding intrapartum decelerations: the critical role of the peripheral chemoreflex. J Physiol (2016), Vol.594(17), p. 4711-4725.

- Johansen H, Ostlie K, Anderson LO, Rand-Hendriksen S, Adults with congenital limb deficiency in Norway: demographic and clinical features, pain and the use of health care and welfare services. A cross-sectional study. Disability and Rehabilitation (2015) 37:22, 2076-2082.

- Postema SG, Bongers RM, Brouwers MA, et al., Upper Limb Absence: Predictors of Work Participation and Work Productivity. Archives of Phsyical Medicine and Rehabilitation (2016) 97:892-9.

- Sjoberg L, Nilsagard Y, Fredriksson C, Life situation of adults with congenital limb reduction deficiency in Sweden. Disability and Rehabilitation (2014) 36:18, 1562-1571.

- Sever JW, Obstetric Paralysis Its Etiology, Pathology, Clinical Aspects and Treatment, with a Report of Four Hundred and Seventy Cases. American Journal of Deseases of Children. Dec 1916, Vol.12(6), p.541-578.

Johnson Graffe Keay Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

- Dunbar DC, et al., Risk factors for neonatal brachial plexus palsy attributed to anatomy, physiology, and evolution. Clinical Anatomy. 2021;34:884-898.

- Kirik, A, et al., Anatomical Variations of Brachial Plexus in Fetal Cadavers. Turk Neurosurg 28(5):783-791, 2018.

- Frade, F, et al. Rehabilitation of Neonatal Brachial Plexus Palsy: Integrative Literature Review. J. Clin. Med. 2019, 8, 980.

- Abzug, JM, Assessment of Current Epidemiology and Risk Factors Surrounding Brachial Plexus Birth Palsy. J Hand Surg Am 2019 Jun; 44(6):515.e1-e10.

- DeFrancesco CJ, The Epidemiology of Brachial Plexus Birth Palsy in the United States: Declining Incidence and Evolving Risk Factors. J Pediatr Orthop Feb 2019,39(2),e134-e140.

- Lear, CA, The peripheral chemoreflex: indefatigable guardian of fetal physiological adaptation to labour. J Physiol 0.0 (2018) pp 1-13.

- Chauhan SP, Shoulder dystocia and neonatal brachial plexus palsy: Eliminating the nightmare. Seminars in Perinatology 38 (2014) 183.

- Turner JM, et al., The physiology of intrapartum fetal compromise at term. American Journal of Obstetrics & Gynecology. Jan 2020, 17-26.

- Sartwelle TP, et al. Electronic fetal monitoring in the twenty-first century: Language, logic and Lewis Carroll. Clinical Ethics 0(0) 1-9, 2020.

- Scher, MS, "The First Thousand Days" Define a Fetal/Neonatal Neurology Program. Frontiers in Pediatrics August 2021, Vol 9.

The foregoing is a summary of this expert's anticipated opinions consistent with the requirements CR 26(b)(5) and governing case law. This is not a transcript of this expert's anticipated testimony and cannot account for expert opinions elicited in response to questioning or cross examination by Plaintiffs' counsel, the nature of which cannot be known. Dr. Scher's opinion may be supplemented after review of additional materials and depositions. Dr. Scher may also offer opinions on any other matter within the scope of his expertise that is relevant to this lawsuit. Dr. Scher may also rebut issues raised by Plaintiffs'

Johnson Graffe Keay Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

experts. The basis for Dr. Scher's testimony will be his education, training, experience, and expertise in his field; his review of the medical records, documents, depositions, declarations, literature, and other pertinent material; and his review of other discovery and evidence as appropriate. Dr. Scher's CV was previously provided.

2. Dolly Browder
200 Woodworth Avenue
Missoula, MT 59801

Dolly Browder is a licensed home birth midwife. Ms. Browder has reviewed the medical records regarding Seng Hamilton from Laura Hamilton, Providence Centralia Hospital, Providence St. Peter Hospital, Providence Centralia Women's Center, and Kaiser Permanente. She has also reviewed photos taken of the delivery and the deposition transcripts of Laura Hamilton, Annette Livingston Bleuler, Cheryl Common, Amy Schofield, Brian Sollers, DO, Hindi Stohl, M.D., and Edith Gurewitsch Allen, M.D.

Ms. Browder will testify that Laura Hamilton met the standard of care in her management of Seng Hamilton's pregnancy, labor, delivery, and postpartum care of Z.H. Ms. Browder is expected to testify that Ms. Hamilton's prenatal care complied with the standard of care. The mother did not gain significant weight during pregnancy and two tests for gestational diabetes were performed, both of which were normal. Ms. Hamilton took reasonable steps to assess the fetal size, including assessing the mother's weight gain and measuring the fundal height of the uterus. Ms. Browder is expected to testify that the circumstances surrounding Z.H.'s pregnancy and birth were appropriate for homebirth by a licensed midwife, and this was completely within the standard of care. Ms. Browder is also expected to testify that shoulder dystocia is not always predictable or preventable. Ms. Hamilton used appropriate maneuvers—including the McRoberts maneuver, attempted to move the baby right and left, checked for the posterior arm, and reduced the left anterior shoulder—to resolve the shoulder dystocia when it occurred in this case, and did so

Johnson Graffe Keay
Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

successfully. Ms. Browder is further expected to testify that persistent nerve damage can occur in births with shoulder dystocia regardless of the maneuvers of the delivery provider, and that the forces of labor alone may cause nerve stretching and injury when the baby is pushed against the mother's pelvic bones. Ms. Hamilton noted that the baby was ROA at the time of delivery. This means the right arm was posterior, which further demonstrates that Z.H.'s injury was most likely caused by the natural forces of labor. It is also noteworthy that the mother delivered in the middle of the bed, which prevents excessive downward pressure on the child's head. Ms. Browder may also testify that it is noteworthy that the mother reported severe muscle cramps as such muscle cramps may be caused by a tight fit of the baby in the maternal pelvis pressing on nerves. Ms. Browder may also testify that Ms. Hamilton appropriately and timely asked that someone in the room call 911 during the shoulder dystocia and provided appropriate resuscitation to Z.H. after the birth. All of this was within the standard of care. Ms. Browder may also testify about the challenges a midwife faces if a medical emergency arises during a homebirth. This was a difficult shoulder dystocia, but due to Ms. Hamilton's efforts, Z.H. was born in a timely manner and sustained no brain injury.

The foregoing is a summary of this expert's anticipated opinions consistent with the requirements CR 26(b)(5) and governing case law. This is not a transcript of this expert's anticipated testimony and cannot account for expert opinions elicited in response to questioning or cross examination by Plaintiffs' counsel, the nature of which cannot be known. Ms. Browder's opinion may be supplemented after review of additional materials and depositions. Ms. Browder may also offer opinions on causation and on any other matter within the scope of her expertise that is relevant to this lawsuit. Ms. Browder may also rebut issues raised by Plaintiffs' experts. The basis for Ms. Browder's testimony will be her education, training, experience, and expertise in her field; her review of the medical records,

Johnson Graffe Keay Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

documents, depositions, declarations, literature, and other pertinent material; and her review of other discovery and evidence as appropriate. Ms. Browder's CV was previously provided.

3. Robert DeMott, M.D.
2205 Palmer Drive
Green Bay, WI 54311

Robert DeMott, M.D. is an obstetrician and gynecologist. Dr. DeMott has reviewed the medical records regarding Seng Hamilton from Laura Hamilton, Providence Centralia Hospital, Providence St. Peter Hospital, Providence Centralia Women's Center, and Kaiser Permanente. Dr. DeMott has also reviewed photos taken of the delivery and the deposition transcripts of Laura Hamilton, Annette Livingston Bleuler, Cheryl Common, Amy Schofield, Brian Sollers, DO, Hindi Stohl, M.D., and Edith Gurewitsch Allen, M.D.

Dr. DeMott will testify that Laura Hamilton met the standard of care. He will testify that there was no way to reliably predict that Seng Hamilton would have a 10-pound baby. He is expected to testify that the standard of care did not require a C-section in Z.H.'s case, nor did it require this be offered. Dr. DeMott is expected to testify that there is no evidence that Seng Hamilton had gestational diabetes in this or in prior pregnancies. He is expected to explain that Z.H. was ROA and the injury was to his posterior arm. This indicates that the injury occurred before the head had crowned. As such, Dr. DeMott is expected to testify that the injury to Z.H., more probably than not, was caused by the natural forces of labor. He is also expected to explain that brachial plexus injuries to the posterior arm have a higher rate of permanency. Dr. DeMott is expected to testify that Z.H.'s injury likely happened before the shoulder dystocia was even evident and that Laura Hamilton saved this baby from potentially catastrophic brain injury and possible death by delivering him before any hypoxic ischemic damage could occur. Dr. DeMott is also expected to testify about the incidence of brachial plexus injuries and the medical research and literature involving brachial plexus

Johnson Graffe Keay
Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

injuries and the natural forces of labor. Such literature may include but is not limited to the following:

- Sandmire, HF and DeMott, RK , Erb's Palsy Causation: A Historical Perspective. Birth , March2002, vol. 29, No. 1, p.52-54.
- Sandmire, HF and DeMott, RK, Erb's Palsy Causation: Iatrogenic or Resulting from LaborForces? J. Of Reprod Med 2005, Vol. 50, No. 8, 563-566
- Sandmire HF and DeMott RK, Newborn brachial plexus palsy. Journal of Obstetrics andGynaecology, August 2008: 28(6): 567-572.
- Sandmire HF and DeMott RK, Controversies surrounding the causes of brachial plexus injury.Inter. J. of Gynecology and Obstetrics 104 (2009), 9-13.
- Sandmire, HF and DeMott, RK: Letter to Editor- Temporary Erb-Duchenne Palsy Without Shoulder Dystocia or Traction to the Fetal Head. Obstet Gynecol. Nov. 2005, vol 106, No. 5,Part 1, 1109.
- DeMott, RK, Letter to the Editor : Brachial plexus deficits with and without shoulder dystocia. Am.Journal of Obstet & Gynecol August 2006, vol. 192, No. 2, p. 630.
- Sandmire, H., DeMott, R. The Green Bay cesarean section study IV. The physician factor as adeterminant of cesarean birth rates for the large fetus. Am J Obstet Gynecol 1996; Vol. 174: No. 5 pg. 1557-1564
- Sandmire, HF and DeMott, RK, Erb's Palsy: Concepts of Causation. Obstet Gynecol, June2000, vol. 95, No. 6, part 1, pg. 941-942.
- Sandmire HF , DeMott RK & Racinet C ; Letter to the Editor: Shoulder dystocia training effects.Am. J. of Obstetrics and Gynecol, Dec. 2011, vol. 205, Issue 6, p. e12-13
- Sandmire, HF and DeMott, RK , Erb's Palsy without shoulder dystocia. Inter. J. of Gyn andObstetrics, Vol. 78, 2002, pages 253-256.
- ACOG Report 2014 – Neonatal Brachial Plexus Palsy – Full Report
- ACOG Practice Bulletic No. 178: Shoulder Dystocia 2017

Johnson Graffe Keay Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

- Grobman, W; Shoulder dystocia. Obstet Gynecol Clin North Am. 2013 Mar;40(1): 59-67.

- Grimm, MJ, Costell, RE, Gonik, B; Effect of clinician-applied maneuvers on brachial plexus stretch during a shoulder dystocia event: investigation using a computer simulation model. Am J Obstet Gynecol. 2010 Oct;203(4):339.e1-5.

- Kreitzer, MS, Gonik, B: Letter to the Editors and Reply: Analysis of shoulder dystocia maneuvers using a computer model. American Journal of Obstetrics & Gynecology, June 2011, e14.

- Chauhan SP, Rose CH, Gherman RB, Magann EF, Holland MW, Morrison JC; Brachial plexus injury: A 23 year experience from a tertiary center. Am J Obstet Gynecol. 2005 Jun;192(6):1795-800; discussion 1800-2.

The foregoing is a summary of this expert's anticipated opinions consistent with the requirements CR 26(b)(5) and governing case law. This is not a transcript of this expert's anticipated testimony and cannot account for expert opinions elicited in response to questioning or cross examination by Plaintiffs' counsel, the nature of which cannot be known. Dr. DeMott's opinion may be supplemented after review of additional materials and depositions. Dr. DeMott may also offer opinions on any other matter within the scope of his expertise that is relevant to this lawsuit. Dr. DeMott may also rebut issues raised by Plaintiffs' experts. The basis for Dr. DeMott's testimony will be his education, training, experience, and expertise in his field; his review of the medical records, documents, depositions, declarations, literature, and other pertinent material; and his review of other discovery and evidence as appropriate. Dr. DeMott's CV was previously provided.

4. Michele Grimm, Ph.D.
Cherry Hill Village
49796 Taft Lane
Canton, MI 48188

Michele Grimm, Ph.D. is a biomechanical engineer. Dr. Grimm has reviewed the medical records regarding Seng Hamilton and Zachary Hamilton from Laura Hamilton and medical records regarding Zachary Hamilton from Seattle Children's Hospital. Dr. Grimm

Johnson Graffe Keay Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

has also reviewed Laura Hamilton's DOH statement regarding the birth of Zachary Hamilton, photos taken of the delivery, and the deposition transcripts of Laura Hamilton, Annette Livingston Bleuler, Cheryl Common, Amy Schofield, Hindi Stohl, M.D., and Edith Gurewitsch Allen, M.D.

Dr. Grimm is expected to testify on causation and damages. It is anticipated that she will testify about the biomechanical aspects of the forces present during labor and delivery and to educate the jury about the same. She is expected to testify that the natural forces present during the labor process are, alone, capable of causing brachial plexus injuries like what Z.H. sustained in this case.

Dr. Grimm is expected to testify that, more probably than not, the brachial plexus injury here occurred before the shoulder dystocia and that nothing Laura Hamilton did caused or contributed to this injury. Dr. Grimm will explain that Z.H. was ROA and the injury he sustained was to his right arm, meaning that his posterior arm was caught on the sacral promontory. This impact occurred before Z.H.'s head delivered. Thus, more probably than not, the injury to Z.H. happened before the shoulder dystocia and was solely caused by the natural forces of labor. It is expected that Dr. Grimm will also testify about medical and biomechanical research and literature relevant to the injury that Z.H. sustained. Such literature may include but is not limited to the following:

- The American College of Obstetricians and Gynecologists, "Neonatal Brachial Plexus Palsy", 2014.
- Grimm, MJ; Maternal Endogenous Forces and Shoulder Dystocia. Clinical Obstetrics and Gynecology. 2016 Dec; Vol 59, No. 4, 820-829.
- Grimm, MJ, Costell, RE, Gonik, B; Effect of clinician-applied maneuvers on brachial plexus stretch during a shoulder dystocia event: investigation using a computer simulation model. Am J Obstet Gynecol. 2010 Oct;203(4):339.e1-5.
- Kreitzer, MS, Gonik, B: Letter to the Editors and Reply: Analysis of shoulder dystocia maneuvers using a computer model. American Journal of Obstetrics & Gynecology, June 2011, e14.

Johnson Graffe Keay Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

- Singh A, Shaji S, Delivoria-Papadopoulos M, Balasubramanian S, "Biomechanical Responses of Neonatal Brachial Plexus to Mechanical Stretch." J Brachial Plex Peripher Nerve Inj, 13(1):e8-e14, 2018.

- Gonik B, Zhang N, Grimm MJ, Prediction of brachial plexus stretching during shoulder dystocia using a computer simulation model. Am J Obstet Gynecol, 189:1168-1172, 2003.

- Gonik, Bernard, et al., "Defining forces that are associated with shoulder dystocia: The use of a mathematic dynamic computer model" American Journal of Obstetrics and Gynecology, Vol 188, No. 4, pgs 1068-72 (2005).

- Allen, Robert H., et. al, "Comparing clinician applied loads for routine, difficult, and shoulder dystocia deliveries" American Journal of Obstetrics and Gynecology, Vol 171, No. 6, pgs 1621-27 (1994).

- Allen, R.H, et al. "Simulating birth to investigate clinician-applied loads on newborns", Med. Eng. Phys., Vol. 17, No. 5 pgs. 380-384 (1995).

The foregoing is a summary of this expert's anticipated opinions consistent with the requirements CR 26(b)(5) and governing case law. This is not a transcript of this expert's anticipated testimony and cannot account for expert opinions elicited in response to questioning or cross examination by Plaintiffs' counsel, the nature of which cannot be known. Dr. Grimm's opinion may be supplemented after review of additional materials and depositions. Dr. Grimm may also offer opinions on any other matter within the scope of her expertise that is relevant to this lawsuit. Dr. Grimm may also rebut issues raised by Plaintiffs' experts. The basis for Dr. Grimm's testimony will be her education, training, experience, and expertise in her field; her review of the medical records, documents, depositions, declarations, literature, and other pertinent material; and her review of other discovery and evidence as appropriate. Dr. Grimm's CV was previously provided.

5. Dana Penilton, RN, BSN, CCM, CLCP
Dana Penilton Consulting, Inc.
6312 S.W. Capitol Hwy. #418
Portland, OR 97239-1937

Johnson Graffe Keay
Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

Dana Penilton, RN, BSN, is a life care planner. Ms. Penilton has reviewed the medical records regarding Zachary Hamilton from Seattle Children's Hospital, Providence Centralia Hospital, Valley View Health Center, and Cascade Community Healthcare. She has also reviewed the records from Oakview Elementary School and the deposition transcripts of Scott Hamilton, Seng Hamilton, and Lorne Label, M.D. She has also reviewed the draft preliminary life care plan by Cloie Johnson (January 2022), and Ms. Johnson's updated Life Care Plan – Feb 2022, narrative report, and life care costs.

Ms. Penilton is expected testify regarding Plaintiffs' claim of damages. She is expected to discuss and rebut the life care plan created by Plaintiffs' life care planner expert, Cloie Johnson. She may also address and rebut other opinions of Ms. Johnson based on her review of Ms. Johnson's deposition testimony. She may also provide her opinion on Z.H.'s future needs in light of his injury. Ms. Penilton may have additional opinions pending her review of additional materials, including direct observation which would permit her to observe how Z.H. interacts with objects and accomplishes daily tasks. Defendant has requested such an examination, but to date Plaintiffs have refused to allow it to occur. Ms. Penliton may address any other issue within the scope of her expertise that is relevant to this case and may rebut the opinions of Plaintiffs' other experts as appropriate.

The foregoing is a summary of this expert's anticipated opinions consistent with the requirements CR 26(b)(5) and governing case law. This is not a transcript of this expert's anticipated testimony and cannot account for expert opinions elicited in response to questioning or cross examination by Plaintiffs' counsel, the nature of which cannot be known. The basis for Ms. Penilton's testimony will be her education, training, experience, and expertise in her field; her review of the records, documents, depositions, declarations, literature, and other pertinent material; and her review of other discovery and evidence as appropriate. Ms. Penilton's CV was previously provided.

Johnson Graffe Keay Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

6. Eric Knowles
The Knowles Group
120 W. Dayton, Suite B9
Edmonds, WA 98020

Eric Knowles is an economist. He has reviewed portions of medical records of Z.H. from Seattle Children's Hospital, Valley View Health Center, and Providence Centralia Hospital. Mr. Knowles has also reviewed the complaint and Seng Hamilton and Scott Hamilton's discovery responses. He has also reviewed the deposition transcripts of Scott Hamilton and Seng Hamilton, and the draft preliminary life care plan by Cloie Johnson (January 2022), and Ms. Johnson's updated Life Care Plan – Feb 2022, narrative report and life care costs.

Mr. Knowles is expected to testify in response to Plaintiffs' economist's report and life care plan and any other reports on damages created by Plaintiffs' experts. He is expected to offer an opinion on Z.H.'s damages from the perspective of an economist and to rebut the opinions of Plaintiffs' economist, William Brandt. Mr. Knowles is expected to testify that even Plaintiffs' life care planning expert, Cloie Johnson, agrees that Z.H.'s pre-injury earning capacity had him employed in a career that required a bachelor or professional degree. He is expected to testify that Z.H. did not suffer any brain injury and thus is not disadvantaged or limited from obtaining degree(s) from institutions of higher education and working in fields that rely on his intellect.

The foregoing is a summary of this expert's anticipated opinions consistent with the requirements CR 26(b)(5) and governing case law. This is not a transcript of this expert's anticipated testimony and cannot account for expert opinions elicited in response to questioning or cross examination by Plaintiffs' counsel, the nature of which cannot be known. Mr. Knowles may address other issues within his expertise as appropriate and may also rebut the opinions of Plaintiffs' experts. It should be noted that Plaintiffs' economist Mr. Brandt has not yet been deposed and no report of his opinions has been produced. The

Johnson Graffe Keay
Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

basis for Mr. Knowles' testimony will be his education, training, experience, and expertise in his field; his review of the records, documents, depositions, literature, declarations, and other pertinent material; and his review of other discovery and evidence as appropriate. Mr. Knowles CV was previously provided.

7. Mary Burgess, LM, CPM, MA
Moonbelly Midwifery
Lynden Birth Center
200 3rd Street
Lynden, WA 98264

Ms. Burgess is a licensed midwife. She has reviewed the records of Laura Hamilton documenting her care of Seng Livingston and baby ZH. She has also reviewed the depositions of Laura Hamilton, Mr. and Mrs. Scott Hamilton, Ms. Bleuler, Ms. Common and Ms. Schofield. Ms. Burgess is expected to testify that Laura Hamilton met the standard of care of a reasonably prudent licensed midwife. Her responsibility is to help deliver the baby while reducing risk of injury. This baby was stuck. There was a severe shoulder dystocia. Laura Hamilton tried to move the baby and the mother. She did McRobert's maneuver. The baby was born; she resuscitated appropriately. The baby recovered quickly with no evidence of brain damage. Ms. Hamilton recognized the nerve injury and called a pediatrician shortly after the birth.

As for prenatal care, she assessed twice for blood sugar which was within normal for random samples. There was no evidence of gestational diabetes. There was no evidence that this baby was too big to deliver without complications. Mrs. Hamilton only gained 8 pounds. The fundal heights were within normal. Ms. Burgess may testify about other matters within her expertise.

The foregoing is a summary of this expert's anticipated opinions consistent with the requirements CR 26(b)(5) and governing case law. This is not a transcript of this expert's anticipated testimony and cannot account for expert opinions elicited in response to

Johnson Graffe Keay
Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

questioning or cross examination by Plaintiffs' counsel, the nature of which cannot be known. Ms. Burgess's opinion may be supplemented after review of additional materials and depositions. Ms. Burgess may also offer opinions on causation and on any other matter within the scope of her expertise that is relevant to this lawsuit. Ms. Burgess may also be asked to rebut issues raised by Plaintiffs' experts. The basis for Ms. Burgess's testimony will be her education, training, experience, and expertise in her field; her review of the medical records, documents, depositions, declarations, and other pertinent material; and her review of other discovery and evidence as appropriate. Ms. Burgess's CV is attached hereto.

V. RESERVATIONS

Defendant makes the following reservations:

1. Discovery is ongoing in this matter and this disclosure is made based on information known at this time and on the pleadings, allegations, and discovery to date. Defendant reserves the right to disclose and call as witnesses any additional persons or experts who may become known or necessary as a result of the discovery process.

2. Defendant reserves the right to call all witnesses identified by any other party in their witness disclosures.

3. Defendant has listed herein those witnesses who may be called to testify. Defendant has not yet made any final decisions about which consulting experts will be asked to testify. By listing a name herein, Defendant does not intend to waive the status of any expert as a consulting expert. Defendant maintains the right to full protection of all consulting experts as provided for by the Civil Rules of Procedure for Washington and applicable case law, which prohibits the use of any deposition, or portion thereof, of any consulting expert not chosen by Defendant to be called as an expert to give testimony at the time of trial.

4. By disclosure of these possible expert witnesses, Defendant does not intend to waive the provisions/protections of *Mothershead v. Adams*, 32 Wn. App. 325, 647 P.2d

Johnson Graffe Keay Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

525 (1982) and/or *Crenna v. Ford Motor Co.*, 12 Wn. App. 824, 532 P.2d 290 (1975). Defendant reserves the right to amend and delete from this disclosure of experts. Defendant will, however, without said waiver, make these witnesses available for deposition. In the event the witnesses listed above are unavailable, Defendant reserves the right to retain and call expert witnesses with similar knowledge and expertise.

5. Defendant incorporates by reference any primary witnesses disclosed by any other party and may call any witnesses listed by those parties. Defendant may call and elicit testimony from any and all witnesses listed by the parties in their disclosure(s) of witnesses and/or discovery responses, or as their identity otherwise becomes known through discovery.

6. This witness disclosure is not intended as a substitute for deposition and all witnesses may offer additional opinions and testimony and/or some topics of testimony may be modified or deleted.

7. Defendant may also call witnesses to identify records, authenticate documents and materials, and/or for other purposes related to the admission of evidence at trial.

8. Defendant reserves the right to strike and/or substitute any of the witnesses listed above.

DATED this 24th day of March, 2022.

JOHNSON, GRAFFE, KEAY, MONIZ &WICK, LLP

/s/ Donna M. Moniz
/s/ R. Pierce Rand

Donna M. Moniz, WSBA #12762
R. Pierce Rand, WSBA #49736
Attorneys for Defendant
Linda Amondson-Muller, the Personal Representative of the Estate of Laura Hamilton

Johnson Graffe Keay Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

925 Fourth Avenue, Suite 2300
Seattle, WA 98104
Telephone: (206) 223-4770
monizd@jgkmw.com

CERTIFICATE OF SERVICE

I declare that on the date below I served this ***Defendant Hamilton's Disclosure of Possible Fact and Expert Witnesses*** on the following parties of record in the manner described:

Simeon J. Osborn, Esq., WSBA#14484
Susan Machler, Esq., WSBA#23256
Austin Neff, Esq., WSBA#57059 ***Via Email***
Osborn Machler
2025 First Avenue, Suite 1200
Seattle, WA 98121
Phone: (206) 441-4110
Fax: (206) 441-4220
sosborn@osbornmachler.com
smachler@osbornmachler.com
aneff@osbornmachler.com
Attorneys for Plaintiffs

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

EXECUTED this 24th day of March, 2022, at Seattle, WA.

s/ Monica M. Welch

Monica M. Welch, Legal Assistant

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

SCOTT HAMILTON, as guardian ad litem for Z.H., Plaintiffs, v. LINDA AMONDSON-MULLER, Personal Representative of the ESTATE of LAURA HAMILTON, Defendants.	NO. 20-2-00543-21 DEFENDANT HAMILTON'S DISCLOSURE OF POSSIBLE REBUTTAL/ALTERNATE WITNESSES

COMES NOW Defendant Linda Amondson-Muller, Personal Representative of the Estate of Laura Hamilton (hereinafter "Defendant"), by and through her attorneys of record, Donna M. Moniz and Johnson, Graffe, Keay, Moniz & Wick, LLP, and hereby submits the following Disclosure of Possible Rebuttal/Alternate Witnesses. Discovery is ongoing in this case, so this disclosure is based on information known to date. This Defendant reserves the right to add additional witnesses as discovery continues and as additional witnesses are identified by any part.

I. FACT WITNESSES

1. Shannon Smith: Ms. Smith was Laura Hamilton's assistant at the time of the care at issue. She may be called to testify about her recollection and/or involvement in the relevant events, if any. She may also rebut the contentions of Plaintiffs' witnesses.

Johnson Graffe Keay Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

2. Katie Ulmer: Based on information and belief, Ms. Ulmer was Ms. Hamilton's assistant during the relevant time who handled bookkeeping, among other tasks. She may be called to testify about her recollection and/or involvement in the relevant events, if any. She may also rebut the contentions of Plaintiffs' witnesses.

Defendant Hamilton further reserves the right to call any fact witnesses disclosed by Plaintiffs, and any of Plaintiffs' health care providers regarding their care and treatment, regardless of whether they may be called in the case-in-chief of any other party.

II. CONSULTING EXPERT WITNESSES

1. Winni McNamara, ARNP, LM
1903 D Street
Bellingham, WA 98225

Winni McNamara, ARNP is a licensed midwife. She reviewed Laura Hamilton's medical records, the deposition transcripts of Laura Hamilton, Annette Blueler, and Sandra Wilkinson, and the information packet that Laura Hamilton provided to her clients.

Ms. McNamara is disclosed as an alternative expert in midwifery who may be called in the event other expert(s) for Defendant Hamilton are unavailable to testify at trial. If called, Ms. McNamara will testify that Laura Hamilton met the standard of care in her midwifery of Seng Hamilton during pregnancy, labor, and delivery. She screened for gestational diabetes with one random blood sugar and one postprandial blood sugar. She regularly obtained weight and measured fundal height in the last weeks of pregnancy. On the last office visit at 35 weeks, the fundus measured 36cm which would be predictive of about a 7-8 pound baby, not much more than Seng had delivered with her first pregnancy. There was no need to screen for an LGA baby; in any case ultrasound is off by 10% at term. When Laura Hamilton arrived at the home for delivery, labor had progressed quickly. There was no reason to expect a problem with delivery. After a short second stage, Laura recognized the shoulder dystocia and used appropriate maneuvers to deliver. This

Johnson Graffe Keay
Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

may look aggressive to bystanders, but was needed to address the shoulder dystocia. She called 911 and successfully resuscitated the baby before they arrived. In the opinion of Ms. McNamara, such a delivery in a hospital setting would likely have involved shoulder dystocia; to a lay person, the appropriate maneuvers used to resolve it would look aggressive. She may also testify about other matters within her expertise.

The foregoing is a summary of this expert's anticipated opinions consistent with the requirements CR 26(b)(5) and governing case law. This is not a transcript of this expert's anticipated testimony and cannot account for expert opinions elicited in response to questioning or cross examination by Plaintiffs' counsel, the nature of which cannot be known. Ms. McNamara's opinion may be supplemented after review of additional materials and depositions. She may also offer opinions on any other matter within the scope of her expertise that is relevant to this lawsuit. She may also rebut issues raised by Plaintiffs' experts. The basis for Ms. McNamara's testimony will be her education, training, experience, and expertise in her field; her review of the medical records, documents, depositions, declarations, literature, and other pertinent material; and her review of other discovery and evidence as appropriate. Ms. McNamara's CV is attached.

III. RESERVATIONS

Defendant Hamilton makes the following reservations:

1. Discovery is ongoing in this matter and this disclosure is made based on information known at this time and on the pleadings, allegations, and discovery to date. Defendant reserves the right to disclose and call as witnesses any additional persons or experts who may become known or necessary as a result of the discovery process.

2. Defendant reserves the right to call all witnesses identified by any other party in their witness disclosures.

Johnson Graffe Keay Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

3. Defendant has listed herein those witnesses who may be called to testify. Defendant has not yet made any final decisions about which consulting experts will be asked to testify. By listing a name herein, Defendant does not intend to waive the status of any expert as a consulting expert. Defendant maintains the right to full protection of all consulting experts as provided for by the Civil Rules of Procedure for Washington and applicable case law, which prohibits the use of any deposition, or portion thereof, of any consulting expert not chosen by Defendant to be called as an expert to give testimony at the time of trial.

4. By disclosure of these possible expert witnesses, Defendant does not intend to waive the provisions/protections of *Mothershead v. Adams*, 32 Wn. App. 325, 647 P.2d 525 (1982) and/or *Crenna v. Ford Motor Co.*, 12 Wn. App. 824, 532 P.2d 290 (1975). Defendant reserves the right to amend and delete from this disclosure of experts. Defendant will, however, without said waiver, make these witnesses available for deposition. In the event the witnesses listed above are unavailable, Defendant reserves the right to retain and call expert witnesses with similar knowledge and expertise.

5. Defendant incorporates by reference any primary witnesses disclosed by any other party and may call any witnesses listed by those parties. Defendant may call and elicit testimony from any and all witnesses listed by the parties in their disclosure(s) of witnesses and/or discovery responses, or as their identity otherwise becomes known through discovery.

6. This witness disclosure is not intended as a substitute for deposition and all witnesses may offer additional opinions and testimony and/or some topics of testimony may be modified or deleted.

7. Defendant may also call witnesses to identify records, authenticate documents and materials, and/or for other purposes related to the admission of evidence at trial.

Johnson Graffe Keay
Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

8. Defendant reserves the right to strike and/or substitute any of the witnesses listed above.

DATED this 28th day of April, 2022.

JOHNSON, GRAFFE, KEAY, MONIZ &WICK, LLP

/s/

Donna M. Moniz, WSBA #12762
R. Pierce Rand, WSBA #49736
Attorneys for Defendant
Linda Amondson-Muller, the Personal Representative of the Estate of Laura Hamilton
925 Fourth Avenue, Suite 2300
Seattle, WA 98104
Telephone: (206) 223-4770
monizd@jgkmw.com

CERTIFICATE OF SERVICE

I declare that on April 28, 2022, I sent this ***Defendant Hamilton's Disclosure of Possible Rebuttal/Alternate Witnesses*** to the following parties of record in the manner described below:

Simeon J. Osborn, Esq., WSBA#14484
Susan Machler, Esq., WSBA#23256
Austin Neff, Esq., WSBA#57059 ***Via Email***
Osborn Machler
2025 First Avenue, Suite 1200
Seattle, WA 98121
Phone: (206) 441-4110
Fax: (206) 441-4220
sosborn@osbornmachler.com
smachler@osbornmachler.com
aneff@osbornmachler.com
Attorneys for Plaintiffs

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

EXECUTED this 28th day of April, 2022, at Seattle, WA.

/s/ Jennifer Sproul
Paralegal to Donna M. Moniz

Johnson Graffe Keay Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

Exhibit – J

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

SCOTT HAMILTON, as guardian ad litem for Z.H., Plaintiffs, vs. LINDA AMONDSON-MULLER, Personal Representative of the ESTATE of LAURA HAMILTON, Defendants.	NO. 20-2-00543-21 PLAINTIFFS' DISCLOSURE OF POSSIBLE FACT AND EXPERT WITNESSES

COMES NOW the Plaintiffs, by and through their counsel, and hereby submit this Disclosure of Possible Fact and Expert Witnesses.

LAY WITNESSES

1. Scott and Seng Hamilton
   c/o Osborn Machler
   2025 First Avenue, Suite 1140
   Seattle, WA 98121

Mr. and Mrs. Hamilton are the parents of plaintiff Z.H., a minor. They will be called to testify regarding the claims and allegations in the Complaint, the treatment provided, the injuries giving rise to the above-captioned lawsuit, plaintiff Z.H.'s medical care and treatment, the parents' conversations and interactions with defendant Laura Hamilton, and all injuries and damages in this case.

OSBORN MACHLER
2025 1st Ave., Ste. 1140
Seattle, WA 98121
206-441-4110 (Tel)
206-441-4220 (Fax)

2. Plaintiffs may call family and friends to testify regarding their knowledge of the plaintiff's conditions, the treatment giving rise to this lawsuit, plaintiff's injuries and damages, and other issues relevant to this case. These witnesses include, but not limited to:

Annette Bleuler (Livingston)
835 76th Ave NE
Olympia, WA 98506
DOB 06/04/1965
(360) 888-0400

Cheryl White
8005 188th Ave SW
Rochester, WA 98579
DOB 12/14/1976
(360) 269-4155

JoAnn Hamilton
P.O. Box 678
Centralia, WA 98531
(425) 829-0919

Amy Scholfield
1002 G. Street
Centralia, WA 98531
12/31/1976
(360) 388-6495

Hussein Karmali
(517) 410-3253

Erin Livingston
3984 47th Ave NE, Salem, OR 97305

Lilly Gress
197 Big Hanaford Rd. Centralia, WA 98531

Lacey Gress
197 Big Hanaford Rd. Centralia, WA 98531

OSBORN MACHLER
2025 1st Ave., Ste. 1140
Seattle, WA 98121
206-441-4110 (Tel)
206-441-4220 (Fax)

Khamsone Damneun (Seng's father)
Setsamay Visetsinh (Seng's stepmom)
1709 North Tower
Centralia, WA 98531
(360) 388-5598.

Ray Wasson (Work friend)
Address Will be Supplemented
Aberdeen, WA
(360) 593-1272

In addition, plaintiffs may call care givers and/or teachers who have witnessed Z.H. and may testify to Z.H.'s day-to-day struggles he has due to his injuries:

Daycare: Margaret's Care A Lot
1216 N. Tower Rd, Centralia, WA 98531
(360) 736-8532

Dells Daycare Center
1212 North Pearl St.
Centralia, WA 360 736 9964

Pre-School: Ford's Prairie Elementary School
1620 Harrison Ave, Centralia, WA 98531
(360) 330-7633

Elementary: Oakview Elementary
201 E. Oakview Ave, Centralia, WA 9853
(360) 330- 7638.

TREATING HEALTHCARE PROFESSIONALS

3. Any and all health care providers who provided care and treatment to plaintiff Z.H., including but not limited to the individuals and facilities identified below:

Isaac S. Pope, M.D.
Pope's Kids' Place
230 Washington Way
Centralia, WA 98531
(360) 736-9147

OSBORN MACHLER
2025 1st Ave., Ste. 1140
Seattle, WA 98121
206-441-4110 (Tel)
206-441-4220 (Fax)

Valley View Health Center
Centralia Pediatrics
220 Washington Way
Centralia, WA 98531-9325
(360) 388-3259

Andrew Nguyen
Rachelle Peterson, MS
Sheryl Dean
Centralia Providence Hospital
914 S. Scheuber Road
Centralia, WA 98531
(360) 330-8720
[Physical and Occupational Therapy]

Seattle Children's Hospital
4800 Sand Point Way N.E.
Seattle, WA 98105
(206) 987-2000
[All treating physicians]

Representative @ Washington State Department of Health

Plaintiffs reserve the right to call any or all health care providers who treated, diagnosed, or cared for plaintiff at any point in time, whether or not they are currently disclosed through discovery, or will be disclosed through discovery in the future. It is expected that such health care providers will testify as to their care and treatment of plaintiff Z.H., the nature and extent of plaintiff's conditions, and may testify regarding causation or damage issues. They may also respond to any issues raised by defendants or defendants' experts. This testimony may involve both fact and expert opinion testimony and will be based on the witness' knowledge, experience, training, and education in the health care field, along with their knowledge of the events in question and their own participation in, and recollections of, plaintiff Z.H.'s care and treatment. One or more of the treating health care providers will testify as to the reasonableness and necessity of the medical treatment and that the charges for the medical care were reasonable.

OSBORN MACHLER
2025 1st Ave., Ste. 1140
Seattle, WA 98121
206-441-4110 (Tel)
206-441-4220 (Fax)

Custodians of records for the facilities identified above may also be called to testify as to the completeness and authenticity of records in their custody and control.

EXPERT WITNESSES

4. Hindi E. Stohl, MD, JD
1000 West Carson Avenue
Box 3-7 West
Torrance, CA 90502
(310) 222-3561

Dr. Hindi Stohl is a board-certified obstetrician/gynecologist. Dr. Stohl may testify regarding the care provided, injuries, damages, and opinions held regarding Z.H. She may address all issues raised by treating providers and defense experts. Dr. Stohl's deposition has been taken by the defense.

Dr. Stohl may testify regarding the standard of care expected of a reasonable healthcare provider providing care during labor and delivery and the cause of Z.H.'s injuries and damages. Dr. Stohl may testify that the defendant lacked adequate understanding of shoulder dystocia and how to manage it correctly. The maneuvers performed by the defendant did not mitigate risk of injury during delivery and instead caused harm. The defendant required Seng Hamilton to push after the shoulder dystocia was diagnosed, which is the opposite of what the standard of care requires. The defendant used excessive force on the baby in a manner that fell below the standard of care. The defendant's prenatal care fell below the standard of care in ways testified to by Dr. Stohl in her deposition, including but not limited to failure to obtain an estimated fetal weight and failure to screen the mother for gestational diabetes. The defendant's treatment caused Z.H.'s injuries on a more probable than not basis. Dr. Stohl may testify regarding other matters consistent with her deposition testimony or if additional information is discovered.

OSBORN MACHLER
2025 1st Ave., Ste. 1140
Seattle, WA 98121
206-441-4110 (Tel)
206-441-4220 (Fax)

Dr. Stohl has reviewed the relevant medical records of the plaintiff and may testify that the care provided to plaintiff by defendant Laura Hamilton did not meet the accepted standard of care, and proximately caused injury to plaintiff. Dr. Stohl's testimony may be based on upon her training, and experience, upon her review of the relevant medical records, and healthcare standards and medical/scientific literature. Dr. Stohl may also respond to any testimony or evidence presented by defendant's witnesses or experts. A copy of her CV has already been provided.

5. Sandra Wilkinson, CNM, RNP
1809 Shady Brook Drive
Thousand Oaks, CA 91362
(805) 444-2624

Sandra Wilkinson, CNM, RNP, is certified nurse midwife, and nurse practitioner. Ms. Wilkinson may testify regarding care provided, injuries, damages, and opinions held regarding Zachary Hamilton. She may address all issues raised by treating provides and defense experts.

Ms. Wilkinson may testify regarding the standard of care expected of a reasonable and healthcare provider providing care during labor and delivery, and the cause of Z.H.'s injuries and damages. Ms. Wilkinson has reviewed the relevant medical records to the plaintiff, and may testify that the care provided to plaintiff by defendant Laura Hamilton did not meet the accepted standard of care, and proximately caused injury to plaintiff. Ms. Wilkinson's testimony may be based on upon her training, and experience, upon her review of the relevant medical records, and healthcare standards and medical/scientific literature. A copy of her CV has already been provided.

OSBORN MACHLER
2025 1st Ave., Ste. 1140
Seattle, WA 98121
206-441-4110 (Tel)
206-441-4220 (Fax)

6. Brian Sollers, D.O.
1314 Mustang Ct.
Prosser, WA 99350
(650) 793-1273

Brian Sollers, DO is a board-certified Obstetrician/Gynecologist. Dr. Sollers may testify regarding the care provided, injuries, damages, and opinions held regarding Z.H. He may address all issues raised by treating providers and defense experts.

Dr. Sollers may testify that the defendant used excessive force in delivering Z.H. and that she failed to use the appropriate maneuvers for responding to shoulder dystocia. The defendant asked Seng Hamilton to continue pushing after the shoulder dystocia became apparent. The defendant failed to screen the mother for gestational diabetes, especially given her family history. Her prenatal care fell below the standard of care in ways that Dr. Sollers testified about in his deposition.

Dr. Sollers may testify regarding the standard of care expected of a reasonable and healthcare provider providing care during labor and delivery, and the cause of Z.H.'s injuries and damages. Dr. Sollers has reviewed the relevant medical records of the plaintiff and may testify that the care provided to plaintiff by defendant Laura Hamilton did not meet the accepted standard of care, and proximately caused injury to plaintiff. Dr. Sollers's testimony may be based on upon his training, and experience, upon his review of the relevant medical records, and healthcare standards and medical/scientific literature. A copy of his CV has already been provided.

7. Edith D. Gurewitsch Allen, MD, MBA, Med., FACOG
222 East 82nd Street, 2C
New York, NY 10028
(443) 766-9117

OSBORN MACHLER
2025 1st Ave., Ste. 1140
Seattle, WA 98121
206-441-4110 (Tel)
206-441-4220 (Fax)

Dr. Edith D. Gurewitsch Allen is a board-certified Obstetrician/ Gynecologist. Dr. Allen may testify regarding the care provided, injuries, damages, and opinions held regarding Z.H. She may address all issues raised by treating providers and defense experts.

Dr. Allen may testify regarding the standard of care expected of a reasonable and healthcare provider providing care during labor and delivery, and the cause of Z.H.'s injuries and damages. Dr. Allen's testimony will focus on the standard of care for managing a shoulder dystocia that is the standard of care for every medical provider who delivers babies. Proper management is taught at every level, including midwives at home births. She will testify that a provider's actions make a difference in whether there is a resulting brachial plexus injury. Research shows that training and rehearsal for managing a shoulder dystocia results in fewer brachial plexus injuries. She will testify that the natural forces of labor do not cause brachial plexus avulsions because of the anatomy of the brachial plexus nerves and that pulling and twisting on the baby's head are required to cause avulsions. The nature and extent of the injuries in this case tells us how much force was used. At least four times the force was used that should be used within the standard of care and maybe up to 10 times.

Dr. Allen will also testify that the force used in this case was not justified. The shoulder dystocia was at most approximately 5 minutes, and the baby was revived with a few puffs and without brain damage. Laura Hamilton put both hands on the baby's head and pushed downward, both of which are incorrect. She turned his head which is also incorrect. She also used her body weight to pull on the baby. The facts of the injury tells what happened that the negligent care caused the brachial plexus injuries.

Dr. Allen has reviewed the relevant medical records of the plaintiff and may testify that the care provided to plaintiff by defendant Laura Hamilton did not meet the accepted standard

OSBORN MACHLER
2025 1st Ave., Ste. 1140
Seattle, WA 98121
206-441-4110 (Tel)
206-441-4220 (Fax)

of care, and proximately caused injury to plaintiff. Dr. Allen's testimony may be based on upon her training, and experience, upon her review of the relevant medical records, and healthcare standards and medical/scientific literature. A copy of her CV has already been provided.

Dr. Allen's deposition has already been taken and her testimony may have additional opinions consistent to said deposition.

8. Lorne Sheldon Label, MD, MBA, FAAN, CPE
1977 Millville Court
Thousand Oaks, CA 91360
(818) 590-6436

Dr. Label is a pediatric neurologist. He will testify regarding Z.H.'s injuries, disabilities, prognosis, and treatment. He will also testify regarding causation. Dr. Label will testify that pulling or other force by the delivering midwife was the cause of Z.H.' s injuries on a more probable than not basis. He will testify that Z.H's injuries are permanent and leave him with significant disabilities. He may have other opinions consistent with his deposition. Dr. Label's testimony may be based on his training, experience, upon his review of the relevant medical records, and medical/scientific literature. A copy of his CV has already been provided.

9. Robert Harry Allen, Ph.D.
222 East 82nd Street, Apt. 2C
New York, NY 10027
(410) 303-9323

Dr. Allen holds a Ph.D. in engineering and is technical director at Birth Injury Prevention, LLC. He will testify regarding how brachial plexus injuries occur during birth from force applied by the health care provider. He may testify regarding the mechanics or physics of nerve injury in general and specifically regarding nerve injuries following shoulder dystocia. He may testify regarding the natural forces of labor and its effect on the brachial plexus nerves. He

OSBORN MACHLER
2025 1st Ave., Ste. 1140
Seattle, WA 98121
206-441-4110 (Tel)
206-441-4220 (Fax)

will testify regarding the ACOG Neonatal Brachial Plexus Palsy publication and other studies regarding the causes of brachial plexus injuries during birth. He may also be called as a rebuttal witness to rebut the testimony of defense expert, Michelle Grimm. Dr. Allen's testimony may be based upon his training and experience and upon his review of the relevant medical records, deposition testimony, and medical/scientific literature. A copy of his CV is attached.

10. Michael D. Freeman, MD, PhD
4500 Kruse Way, Plaza I, Suite 385
Lake Oswego, OR 97035
(971) 255-1008

Michael D. Freeman, MD, PhD is board certified in forensic sciences. Dr. Freeman will be a rebuttal witness to defendant's witnesses. Dr. Freeman may testify regarding the epidemiology and biomechanical aspects of the theory of natural forces of labor. Dr. Freeman may address all issues raised by defense experts, including causation. Dr. Freeman's testimony may be based upon his training and experience, and upon his review of the relevant medical records, relevant deposition testimony, and medical/scientific literature. A copy of his CV has already provided.

11. Cloie B. Johnson, M.Ed, A.B.V.E., C.C.M.
10132 NE 185th Street
Bothell, WA 98011
(425) 486-4040

Cloie Johnson, M.Ed. is a certified vocational rehabilitation counselor and certified case manager with experience and expertise in rehabilitation and life care planning. Ms. Johnson may testify regarding care issues based on her review of medical records, and consultation with medical professionals in preparing a life care plan for plaintiff. Ms. Johnson may testify to her assessment of the needs of Z.H. for future care, medications, equipment, medical care, therapy, and all other needs and expenses. A copy of her CV has already been provided.

OSBORN MACHLER
2025 1st Ave., Ste. 1140
Seattle, WA 98121
206-441-4110 (Tel)
206-441-4220 (Fax)

12. William G. Brandt, CPA, ABV, MBA, CFF
P.O. Box 10187
Bainbridge Island, WA 98110
(206) 201-3033

William G. Brandt, CPA, MBA, ABV, CFF is an economist. Mr. Brandt may testify about plaintiff Z.H.'s economic losses and damages, impairment of future earning capacity, present value of future care needs, and other economic losses. He may testify to an analysis of the life care plan of Cloie Johnson and the monetary value necessary for the use of the plan. A copy of his CV has already been provided.

13. Plaintiffs reserve the right to call any fact, expert, rebuttal, or impeachment witnesses as authorized or permitted by law and the schedule in this case.

14. Plaintiffs reserve the right to call any witnesses identified by defendants in this case, either through witness disclosures or identified through discovery. Plaintiffs therefore incorporates by reference the witness disclosures of all other parties in this case.

15. Plaintiffs maintain the right to full protection of all consulting expert witnesses as provided for by the Civil Rules, Local Rules, and applicable case law, including, but not limited to, prohibiting any party from using any deposition, or portions thereof, of any consulting expert not chosen by plaintiffs to be called as an expert witness to give testimony at trial.

16. Plaintiffs reserve the right to modify, supplement, and/or delete witnesses from this list, and/or identify additional witnesses that further discovery may reveal, or whose importance may be indicated by later responses to discovery or by relevant records produced or received. Discovery is ongoing in this matter and not yet completed.

17. Plaintiffs reserve the right to modify, supplement, or and/or withdraw witnesses from this list pursuant to *Mothershead v. Adams*, 32 Wn. App. 325 (1982).

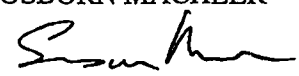
OSBORN MACHLER
2025 1st Ave., Ste. 1140
Seattle, WA 98121
206-441-4110 (Tel)
206-441-4220 (Fax)

18. Should any expert witness be unable to testify due to scheduling conflicts or other issues, plaintiffs reserve the right to identify another expert of similar professional standing and qualifications to testify to the same subject matter.

19. Defendants may not make any ex-parte contact with any of the expert witnesses or those witnesses who are plaintiffs' health care providers, including attempts to schedule the depositions of these witnesses. All arrangements for depositions of these witnesses must be made through the attorneys for plaintiffs.

Dated this 25th day of February 2022.

OSBORN MACHLER



Susan Machler, WSBA #23256
Simeon J. Osborn, WSBA #14484
Austin Neff. WSBA #57059
Attorneys for Plaintiffs

OSBORN MACHLER
2025 1st Ave., Ste. 1140
Seattle, WA 98121
206-441-4110 (Tel)
206-441-4220 (Fax)

CERTIFICATE OF SERVICE

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

Attorneys for Defendant:
Donna Moniz
925 4th Ave, Ste. 2300
Seattle, WA 98104

- ☐ Via Electronic Filing
- ☐ Via Legal Messenger
- ☐ Via U.S. Mail
- ☒ Via E-Mail: monizd@jgkmw.com; vasquezb@jgkmw.com; randp@jgkmw.com; sproulj@jgkmw.com
- ☐ Via Fax:

Dated this 25th day of February 2022 at Seattle, Washington.

Jenine Michaelis
Paralegal

OSBORN MACHLER
2025 1st Ave., Ste. 1140
Seattle, WA 98121
206-441-4110 (Tel)
206-441-4220 (Fax)

Exhibit – K

Honorable James W. Lawler
Hearing on April 2, 2018 at 1:00 PM
With Oral Argument

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

SCOTT AND SENG HAMILTON, individually and the marital community composed thereof, and SCOTT HAMILTON, as guardian ad litem for Zachary Hamilton, Plaintiffs, vs. LAURA HAMILTON and JOHN DOE HAMILTON, individually and the marital community composed thereof; and LAURA HAMILTON LICENSED MIDWIFE, a Washington sole proprietorship, Defendants.	NO. 17-2-00538-21 DEFENDANT HAMILTON'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE: STATUTE OF LIMITATIONS

I. RELIEF REQUESTED

Plaintiffs Scott and Seng Hamilton have brought an independent claim for damages under RCW 4.24.010 based upon the alleged wrongful injury of their minor child at the time of his birth. Their claim, however, was commenced more than 3 years after the last allegedly negligent act or omission occurred (i.e. the date of birth) and is thus time-barred by the applicable statute of limitations. Therefore, defendant Laura Hamilton respectfully

Johnson Graffe Keay
Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

requests that the Court grant this motion for partial summary judgment and dismiss this claim with prejudice.

II. STATEMENT OF FACTS

Zachary Hamilton was born with a brachial plexus injury on April 9, 2014. (*See* Dkt. No. 1 [Compl.] at § 3.) The plaintiffs erroneously attribute this injury to the care of Laura Hamilton, who was the midwife involved in the delivery. (*Id.* at § 3, 4.)

On May 3, 2017, the plaintiffs filed a Complaint in this Court, bringing a claim for medical negligence on behalf of Zachary Hamilton, as well as an independent claim for damages on behalf of his parents, Scott and Seng Hamilton. (*Id.* at § 5.) With respect to the parents' claim, the Complaint seeks damages for their alleged "pain, suffering, mental anguish, emotional distress, inconvenience, loss of consortium, loss of society and companionship, and destruction of the parent-child relationship," among other things. (*Id.* at ¶ 5.1.)

This claim, however, is not actionable as a matter of law because it was commenced after the 3-year statute of limitations had run. Therefore, this motion for partial summary judgment follows.

III. ISSUE

Should the parents' independent claim for damages under RCW 4.24.010 be dismissed with prejudice where it was commenced after the 3-year statute of limitations had run?

IV. EVIDENCE RELIED UPON

Defendant Hamilton relies upon the pleadings and papers already on file with this Court.

Johnson Graffe Keay Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

V. AUTHORITY

A. Summary judgment is appropriate here.

The standard for summary judgment is a well-established maxim: whether there exists a genuine issue of material fact on the record as it stands. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); CR 56. And there can be no issue of material fact here because plaintiffs Scott and Seng Hamilton failed to commence their claim under RCW 4.24.010 within the applicable statute of limitations.

B. The parents' independent claim for damages is time-barred by the applicable statute of limitations.

A statute of limitations designates a fixed time period in which a claim must be filed. *See Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.*, 166 Wn.2d 475, 484, 209 P.3d 863, 869 (2009), *as corrected* (Sept. 22, 2009). "The purpose of statutes of limitations is to shield defendants and the judicial system from stale claims." *Crisman v. Crisman*, 85 Wn. App. 15, 19, 931 P.2d 163, 165 (1997), *as amended on denial of reconsideration* (Feb. 14, 1997). "When plaintiffs sleep on their rights, evidence may be lost and witnesses' memories may fade." *Id.* Thus, as a matter of policy, "[i]t is believed that it is better for the public that some rights be lost than that stale litigation be permitted." *O'Neil v. Estate of Murtha*, 89 Wn. App. 67, 73, 947 P.2d 1252, 1255-56 (1997) (quoting *Thomas v. Richter*, 88 Wn. 451, 456, 153 P. 333, 336 (1915)).

Here, any claim for damages by Scott and Seng Hamilton must be brought under RCW 4.24.010, which in pertinent part provides as follows:

> A mother or father, or both, who has regularly contributed to the support of his or her minor child, ... may maintain or join as a party an action as plaintiff for the injury or death of the child.
>
> This section creates only one cause of action ...
>
> In such an action, in addition to damages for medical, hospital, medication expenses, and loss of services and support, damages may be recovered for

Johnson Graffe Keay Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

> the loss of love and companionship of the child and for injury to or destruction of the parent-child relationship in such amount as, under all the circumstances of the case, may be just.

RCW 4.24.010. Put simply, RCW 4.24.010 allows the parents of a wrongfully injured minor child to bring an independent claim for the alleged damages *they* independently sustained. At its core, the parents' claim is one for loss of consortium as the compensable damages include "loss of love and companionship of the child and for injury to or destruction of the parent-child relationship." RCW 4.24.010; *see also Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 132 (FN1), 691 P.2d 190, 191 (1984) (illustrating that a loss of consortium claim can manifest in various forms, including between spouses and parents and children). Although based on the underlying injury of another, our "Supreme Court has characterized the [loss of consortium] action as separate and independent rather than derivative." *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 776, 733 P.2d 530, 538 (1987) (quoting *Christie v. Maxwell*, 40 Wn.App. 40, 44, 696 P.2d 1256, 1258 (1985)).

Where the underlying injury to the child was allegedly caused by medical negligence—as here—our Supreme Court recently confirmed that a parent's claim for damages under RCW 4.24.010 is governed by the medical negligence statute of limitations, RCW 4.16.350. *See Fast v. Kennewick Pub. Hosp. Dist.*, 187 Wn.2d 27, 40, 384 P.3d 232, 239 (2016) (holding that a parent's claim for the wrongful death of a minor child under RCW 4.24.010 was governed by the medical negligence statute of limitations, RCW 4.16.350).[1] The medical negligence statute of limitations, RCW 4.16.350, "requires filing a claim for medical negligence within three years of the allegedly negligent act or

[1] Although the *Fast* holding specifically focuses on a parent's claim for wrongful death of a minor child, the holding naturally extends to a parent's consortium claim for injury to a minor child. Both claims are brought under the same statute, RCW 4.24.010, and it follows that if the medical negligence statute of limitations applies where a child's death resulted from alleged medical negligence, so too must it apply where the child's injury resulted from alleged medical negligence. Our Supreme Court recognized this to be true, noting that "*Fast* is the only Washington appellate court decision to address the statute of limitations applicable to claims for ***injury or death*** of a child under RCW 4.24.010." *Fast*, 187 Wn.2d at 38 (FN 12) (emphasis added).

Johnson Graffe Keay Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

omission or within one year of when the negligence is or should have been discovered, whichever is later." *Id.* at 29 (citing RCW 4.16.350(3)). "The three-year limitations period commences at the time of the last act or omission that allegedly caused the injury." *Unruh v. Cacchiotti*, 172 Wn.2d 98, 107, 257 P.3d 631, 635 (2011).

The analysis here is very straightforward. According to the Complaint, Zachary Hamilton was born with a "limp arm" from a brachial plexus injury, which the plaintiffs erroneously allege was caused by defendant Laura Hamilton's medical negligence. (*See* Dkt. No. 1 at § 3-5.) Thus, the medical negligence statute of limitations, RCW 4.16.350, applies to the parents' independent claim for damages under RCW 4.24.010. *See Fast*, 187 Wn.2d at 40. In order to comply with this statute's requirements, Scott and Seng Hamilton needed to have commenced their claim within 3 years of the last allegedly negligent act or omission, which undoubtedly occurred on the date of Zachary's birth: April 9, 2014. (*See* Dkt. No. 1 at ¶ 3.1.) Yet they did not file their Complaint (or otherwise commence this action) until May 3, 2017—after the 3-year statute of limitations had already run. (*Id.*) As result, the parents' independent claim for damages is facially time-barred and dismissal is required as a matter of law.

C. The parents' independent claim for damages is not tolled by Zachary Hamilton's minority.

Zachary Hamilton's own claim for medical negligence is not time-barred by the medical negligence statue of limitations because the limitations period is tolled during his minority under RCW 4.16.190(1), which provides as follows:

> Unless otherwise provided in this section, if a person entitled to bring an action mentioned in this chapter, except for a penalty or forfeiture, or against a sheriff or other officer, for an escape, be at the time the cause of action accrued either under the age of eighteen years, or incompetent or disabled to such a degree that he or she cannot understand the nature of the proceedings, such incompetency or disability as determined according to chapter 11.88 RCW, or imprisoned on a criminal charge prior to

Johnson Graffe Keay Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

> sentencing, the time of such disability shall not be a part of the time limited for the commencement of action.

RCW 4.16.190(1). But this tolling provision, by its plain language, applies *only* to the claims held by the minor child. It does not also toll the parents' *independent* claim for damages under RCW 4.24.010. If that was intended, the statute would need to specifically say so. The Court "must not add words where the legislature has chosen not to include them." *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283, 1288 (2010) (quoting *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598, 601 (2003)).

Moreover, there is absolutely no basis to conclude that the parents' independent claim for damages is tolled during the period of Zachary's minority. Indeed, Tegland explains to the contrary:

> The disability toll only applies to the claim of the disabled person. Hence, a derivative or quasi-derivative claim by one who is not under a disability, such as that of a spouse for loss of the disabled spouse's consortium, ***does not get the toll.***

Tegland, *Personal disability—Generally*, 15A Wash. Prac., Handbook Civil Procedure § 4.3 (2017-2018 ed.) (citing *Hatzenbuhler v. Harrison*, 49 Wn.2d 691, 306 P.2d 745 (1957)) (emphasis added).

Case law is in accord. In *Hatzenbuhler v. Harrison*, 49 Wn.2d 691, 306 P.2d 745 (1957), a minor child was injured after being struck by an out-of-control vehicle. After the statute of limitations had run, the child's father filed suit, bringing claims for damages on behalf of the child and for himself individually. *Id* at 692-93. On review, our Supreme Court held that the father's cause of action, though not the child's, was barred by the applicable statute of limitations. *Id.* 698-700. Although the limitations period on the child's

Johnson Graffe Keay Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

claim was tolled due to her minority, the father's claim was not entitled to the same protections. *Id.*[2]

This is true here as well. While Zachary Hamilton's claim for damages is tolled during his minority, his parents' independent claim is not. They were required to comply with the 3-year medical negligence statute of limitations, but failed to do so. Therefore, dismissal is required as a matter of law.

VI. CONCLUSION

For the reasons stated above, defendant Laura Hamilton respectfully requests that the Court grant this partial motion for summary judgment. The claim for damages on behalf of Scott and Seng Hamilton is facially time-barred by the applicable statute limitations, and dismissal is required as matter of law.

DATED this 14th day of February, 2018, at Seattle, Washington.

JOHNSON, GRAFFE, KEAY, MONIZ & WICK, LLP

Donna M. Moniz WSBA #12762
R. Pierce Rand WSBA#49736
Attorneys for Defendant Laura A. Hamilton, LM
925 Fourth Avenue, Suite 2300
Seattle, WA 98104
Telephone: (206) 223-4770
Fax: (206) 386-7344
donnam@jgkmw.com
randp@jgkmw.com

[2] The holding in *Hatzenbuhler* remains good law and was cited with approval in *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 222, 770 P.2d 182, 186 (1989).

CERTIFICATE OF SERVICE

I declare that on the 15th of February, 2018, I sent this ***Defendant Hamilton's Motion for Partial Summary Judgment Re: Statute of Limitations*** to the Clerk of the Court for filing. I also declare that I sent a copy of this filing to the following parties of record in the manner described below:

Simeon J. Osborn, Esq., WSBA#14484
Susan Machler, Esq., WSBA#23256
William J. Dow, Esq., WSBA#51155
Osborn Machler
2025 First Avenue, Suite 1200
Seattle, WA 98121
Phone: (206) 441-4110
Fax: (206) 441-4220
sosborn@osbornmachler.com
smachler@osbornmachler.com
wdow@osbornmachler.com
Attorneys for Plaintiffs

Via E – and US Mail

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

EXECUTED this 15th day of February, 2018, at Seattle, WA.

/s/ Bana Devi S. Vasquez
Assistant to Donna M. Moniz

Johnson Graffe Keay Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

OSBORN MACHLER
APR 02 2018
RECEIVED

Rec'd & Filed
Lewis County Superior Court
MAR 27 2018
Lewis County Clerk

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

SCOTT AND SENG HAMILTON, individually and the marital community composed thereof, and SCOTT HAMILTON, as guardian ad litem for Zachary Hamilton, Plaintiffs, vs. LAURA HAMILTON and JOHN DOE HAMILTON, individually and the marital community composed thereof; and LAURA HAMILTON LICENSED MIDWIFE, a Washington sole proprietorship, Defendants.	NO. 17-2-00538-21 ~~[PROPOSED]~~ ORDER GRANTING MOTION FOR ORDER OF VOLUNTARY DISMISSAL OF SCOTT AND SENG HAMILTON **(CLERK'S ACTION REQUIRED)**

THIS MATTER having come before the Court on the motion of the plaintiffs for voluntary dismissal, and the Court having considered the records and files herein, it is hereby

ORDERED, ADJUDGED AND DECREED that the plaintiffs Scott and Seng Hamilton, individually and the marital community composed thereof, in this case, are dismissed without prejudice. The plaintiff Scott Hamilton, as guardian ad litem for Zachary Hamilton will remain in this case; and the claims of Zachary Hamilton are not affected by this order.

DONE IN OPEN COURT this 26 day of March, 2018.

JOELY A. O'ROURKE

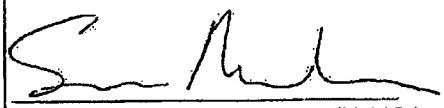
Judge/~~Court Commissioner~~

COPY

OSBORN MACHLER
2025 1st Ave., Ste. 1200
Seattle, WA 98121
206-441-4110 (Tel)
206-441-4220 (Fax)

Presented By:

OSBORN MACHLER



Simeon J. Osborn, WSBA #14484
Susan Machler, WSBA #23256
OSBORN MACHLER, PLLC
2025 1st Avenue, Ste. 1200
Seattle, WA 98121
ATTORNEYS FOR PLAINTIFFS

OSBORN MACHLER
2025 1st Ave., Ste. 1200
Seattle, WA 98121
206-441-4110 (Tel)
206-441-4220 (Fax)

Exhibit – L

Received & Filed
LEWIS COUNTY, WASH
Superior Court

SEP 25 2015

By Kathy A. Brack, Clerk
Deputy

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

LEVI ZANE MYHRE, a minor, by and through his Guardian ad Litem, WILLIAM L. E. DUSSAULT, **Plaintiff,** **vs.** **LAURA HAMILTON, individually and her marital community; LAURA HAMILTON LICENSED MIDWIFE, a Washington business** **Defendants.**	**No. 14-2-01043-3** **ORDER RE DEFENDANT LAURA HAMILTON'S MOTIONS *IN LIMINE*** **[PROPOSED]**

THIS MATTER having come on regularly before the Court on Defendant Laura A. Hamilton's ("Defendant") Motions *in Limine*, and the Court having and the Court having reviewed the defendant's and plaintiff's submissions and the pleadings and records on file herein; and the Court having heard oral argument of counsel, and the Court being fully advised in the premises, it is **HEREBY ORDERED** that:

A. The parties will offer no evidence, argument, exhibits, testimony, or any other statement before the jury regarding any subject matter addressed in the Motions *in Limine* that have been excluded by the Court;

B. The attorneys are instructed to inform all of their witnesses regarding the scope of this Order;

JOHNSON, GRAFFE,
KEAY, MONIZ & WICK, LLP
ATTORNEYS AND COUNSELORS AT LAW
925 FOURTH AVENUE, SUITE 2300
SEATTLE, WASHINGTON 98104
PHONE (206) 223-4770
FACSIMILE (206) 386-7344

C. There is an affirmative duty upon each attorney who believes that evidence excluded by this Order has become admissible, due to testimony that has been elicited at trial, to raise any argument regarding the admissibility of such evidence with the Court, outside the presence of the jury; and

D. Specifically, the Court Orders as to Defendant's Motions *in Limine*, as follows:

1. **Evidence regarding the defendant's or an expert's history of prior medical malpractice lawsuits, Department of Health proceedings, or retention of or by defense counsel is not relevant and Defendant Hamilton respectfully requests it be excluded.**

Agreed _____ Granted ✓ Denied _____

Comment: _____

_____

2. **Evidence regarding any brachial plexus injuries experienced by Laura Hamilton's patients following the birth of Levi Myhre is not relevant and Defendant Hamilton respectfully requests it be excluded.**

Agreed _____ Granted ✓ Denied _____

Comment: _____

_____

3. **Criticisms of the defendant's care not linked to plaintiff's damages by standard of care and causation testimony are irrelevant, may mislead the jury, and are unduly prejudicial. Defendant Hamilton respectfully requests that the Court exclude all such criticisms.**

Agreed _____ Granted ✓ Denied _____

Comment: _____

_____

JOHNSON, GRAFFE,
KEAY, MONIZ & WICK, LLP
ATTORNEYS AND COUNSELORS AT LAW
925 FOURTH AVENUE, SUITE 2300
SEATTLE, WASHINGTON 98104
PHONE (206) 223-4770
FACSIMILE (206) 386-7344

4. **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.**

Agreed _____ Granted ✓ Denied _____

Comment: _____

_____

5. **Defendant Hamilton respectfully requests that the Court exclude use of the "Reptile Strategy".**

Agreed _____ Granted _____ Denied ✓

Comment: _____

_____

6. **All arguments – direct or indirect – about "sending a message" or otherwise punishing the defendant are an attempt to circumvent Washington prohibition on punitive damages. Defendant Hamilton respectfully requests those arguments be excluded.**

Agreed _____ Granted ✓ Denied _____

Comment: _____

_____

7. **Any disclosure that defense counsel has retained the plaintiff's experts in other cases is irrelevant, potentially misleading, and has no probative value. Defendant Hamilton respectfully requests those disclosures be prohibited.**

Agreed _____ Granted _____ Denied ✓

Comment: _____

_____

JOHNSON, GRAFFE,
KEAY, MONIZ & WICK, LLP
ATTORNEYS AND COUNSELORS AT LAW
925 FOURTH AVENUE, SUITE 2300
SEATTLE, WASHINGTON 98104
PHONE (206) 223-4770
FACSIMILE (206) 386-7344

8. **Defendant Hamilton respectfully requests that the Court require a trial schedule.**

Agreed _____ Granted ✓ Denied _____

Comment: as below

9. **Defendant Hamilton respectfully requests that the Parties be required to give 48-hour notice of witnesses to be called at trial.**

Agreed _____ Granted ✓ Denied _____

Comment: _____

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

Agreed _____ Granted ✓ Denied _____

Comment: All witnesses including experts

11. **Arguments or statements regarding the credibility of a party or witness by counsel according to his or her own personal belief are prohibited by RPC 3.4(e) and are not evidence. Defendant Hamilton respectfully requests those arguments and statements be excluded.**

Agreed _____ Granted ✓ Denied _____

Comment: _____

JOHNSON, GRAFFE, KEAY, MONIZ & WICK, LLP
ATTORNEYS AND COUNSELORS AT LAW
925 FOURTH AVENUE, SUITE 2300
SEATTLE, WASHINGTON 98104
PHONE (206) 223-4770
FACSIMILE (206) 386-7344

12. **Defendant Hamilton respectfully requests that the plaintiff be limited to offering only rebuttal witnesses or evidence that is not repetitive or whose testimony could not have been anticipated in their case in chief.**

Agreed _____ Granted _____ Denied _____

Comment: Reserved

13. **Testimony by lay witnesses, including Levi Myhre's adoptive parents, as to what they have been told by treating providers is hearsay and Defendant Hamilton respectfully requests that the Court exclude such testimony.**

Agreed _____ Granted ✓ Denied _____

Comment: _____

14. **Testimony by lay witnesses, including Levi Myhre's adoptive parents, about Levi's state of mind, feelings, and pain and suffering is speculative and Defendant Hamilton requests that any such testimony be excluded.**

Agreed _____ Granted ✓ Denied _____

Comment: _____

15. **Defendant Hamilton respectfully requests that expert witnesses be precluded from testifying as to what they would do in a particular case.**

Agreed _____ Granted _____ Denied ✓

Comment: _____

JOHNSON, GRAFFE,
KEAY, MONIZ & WICK, LLP
ATTORNEYS AND COUNSELORS AT LAW
925 FOURTH AVENUE, SUITE 2300
SEATTLE, WASHINGTON 98104
PHONE (206) 223-4770
FACSIMILE (206) 386-7344

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

Agreed _____ Granted _____ Denied ✓

Comment: _____

_____

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

Agreed _____ Granted _____ Denied _____

Comment: Reserved

_____

18. **All mention of settlement, settlement discussions, lack of settlement discussions, or the parties' positions on settlement is prohibited under ER 408. Defendant Hamilton respectfully requests that the Court exclude any mention of or reference to settlement.**

Agreed _____ Granted ✓ Denied _____

Comment: _____

_____

19. **Whether the defendant carries liability insurance is not relevant to her liability and Defendant Hamilton respectfully requests that the Court prohibit any reference to or solicitation of testimony about defendants' liability insurance.**

Agreed _____ Granted ✓ Denied _____

Comment: _____

_____

JOHNSON, GRAFFE, KEAY, MONIZ & WICK, LLP
ATTORNEYS AND COUNSELORS AT LAW
925 FOURTH AVENUE, SUITE 2300
SEATTLE, WASHINGTON 98104
PHONE (206) 223-4770
FACSIMILE (206) 386-7344

20. **Evidence of collateral source benefits is admissible in a medical malpractice action, and under the facts of this case, ~~accordingly Defendant Hamilton~~ respectfully requests ~~that~~ the plaintiff be precluded from offering any evidence of ~~an obligation~~ to repay.**

Also admissible on contract billed, amount paid, ability to repay.

Agreed _____ Granted _____ Denied _____

Comment: _____

21. **Defendant Hamilton respectfully requests she be allowed to offer evidence, particularly through testimony of her experts, of other possible causes of the plaintiff's injuries.**

Agreed _____ Granted ✓ Denied _____

Comment: except as to maternal forces of labor which the court will be - mist

22. **Evidence or testimony of any theories of negligence not disclosed by the plaintiff's experts in depositions or declarations would be untimely, would surprise the defendant and would not permit ample time for the defendant to retain rebuttal witnesses. Defendant Hamilton respectfully requests that such evidence or testimony be precluded by the Court.**

Agreed _____ Granted _____ Denied _____

Comment: Reserved

DONE IN OPEN COURT this 25 day of September, 2015.

James W. Lawler

Honorable James W. Lawler

JOHNSON, GRAFFE, KEAY, MONIZ & WICK, LLP
ATTORNEYS AND COUNSELORS AT LAW
925 FOURTH AVENUE, SUITE 2300
SEATTLE, WASHINGTON 98104
PHONE (206) 223-4770
FACSIMILE (206) 386-7344

Presented by:

JOHNSON, GRAFFE,
KEAY, MONIZ & WICK, LLP

By Karin J. Mitchell
Donna M. Moniz, WSBA #12762
Karin J. Mitchell, WSBA #44101
Attorneys for Defendant Laura A. Hamilton

JOHNSON, GRAFFE,
KEAY, MONIZ & WICK, LLP
ATTORNEYS AND COUNSELORS AT LAW
925 FOURTH AVENUE, SUITE 2300
SEATTLE, WASHINGTON 98104
PHONE (206) 223-4770
FACSIMILE (206) 386-7344

Exhibit – M

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.,

Plaintiff,

vs. No. 20-2-00543-21

LINDA AMONDSON-MULLER, personal representative of the Estate of LAURA HAMILTON,

Defendant.

VIDEO ZOOM Deposition of: HINDI STOHL, M.D.

Taken Via: Zoom

Time 1:30 p.m.

Date: Tuesday, January 11, 2022

Called By: Defendant

Reported by: CHERYL A. PELLETIER

CERTIFIED COURT REPORTER, CCR 2344

A It's the -- the cause of the shoulder dystocia is the impaction of the fetal shoulder behind, typically, the maternal pubic bone. It can be a posterior, but it's typically an anterior issue of the fetal shoulder behind the maternal pubic bone; which is primarily correlated to the maternal pelvic size and the fetal size, including the fetal sort of bisacrominal diameter, which is a little bit extrapolated based on the girth as you mentioned, but also the proportions. So diabetic babies have proportions that predispose them to shoulder dystocia more than a non-diabetic baby.

Or I should clarify that. A baby of a diabetic mother compared to a baby of a non-diabetic mother.

Q And while you believe more should have been done to evaluate the blood sugar levels in Seng Livingston while she was pregnant with Zach, you have no actual evidence that she was diabetic in that pregnancy; correct?

A There is no objective data that she was diabetic other than the fact that the baby was large, which was very large for her. She did not gain that much weight and I had inadequate assessment for gestational diabetes. So those do call into question as to whether or not she was truly an undiagnosed gestational diabetic during her pregnancy.

Q Women can have large babies without being

diabetic; correct?

A Absolutely.

Q And women can have different size babies with the same father regardless of diabetes; right?

A Yes, sure.

Q What is the risk of a brachial plexus injury once there is a shoulder dystocia?

A I do not know the exact percentage off the top of my head. It's low. But I don't know the exact -- excuse me, permanent is low, very low.

Q Sometimes babies are intentionally injured, such as a clavicle fracture, in order to attempt to resolve a shoulder dystocia; correct?

A Yes, that's correct.

Q Have you ever done that?

A I have not personally done that, no.

Q Clavicles may also break spontaneously in the course of delivery; right?

A Yeah, they do occasionally, uh-huh.

Q How much force is required to break a clavicle compared to the force to cause an avulsion of the brachial plexus?

A I don't know that I can answer that. I'm not a, I'm not a sort of expert on, on all the different forces and Newton's and stuff.

Exhibit – N

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,

vs. No. 20-2-00543-21

LINDA AMONDSON-MULLER, Personal Representative of the ESTATE of LAURA HAMILTON,

Defendants.

VIDEO DEPOSITION OF BRIAN SOLLERS, D.O.

BE IT REMEMBERED that on the 7th day of January, 2022, at the hour of 10:01 a.m., the video deposition of BRIAN SOLLERS, D.O., was taken at the request of the Defendants, before Caryn E. Winters Keller, CRR-RPR-CCR-CSR, Washington CCR No. 2496, Idaho CSR No. 237, at Prosser, Washington, pursuant to the Washington Rules of Civil Procedure.

patient had gestational diabetes?

A It's -- it's really not acceptable to just do one random blood sugar, if that's what was actually done, or even just one postprandial blood sugar.

If you have a patient that's not able to perform a glucose challenge test, then you would ask for at least a number of -- two weeks at minimum of monitoring the glucose, fasting two hours postprandial, which would mean breakfast, lunch and dinner. So a total of four times per day to be able to decide whether or not the patient has gestational diabetes.

The standard of care in my opinion is that patients with any sort of risk factor, and also just normal pregnancies, should undergo gestational diabetes glucose challenge tests with a Glucola drink, followed by a one-hour draw, which is usually also accompanied with a complete blood count to look for anemia, as well as thrombocyte leukemia, which was not performed.

Q So you believe the standard of care for licensed midwives, even though you don't know what that is, would have required a glucose challenge test or some more elaborate alternative to the testing that Ms. Hamilton did; is that correct to say?

A Yes.

Q But with the evidence we have, based on Ms.

Hamilton's records and her deposition description of the glucose readings, there is no evidence of gestational diabetes in this pregnancy, correct?

A It's inconclusive. I can't make that decision or determination.

Q Let me ask you this: When you have a patient who describes feeling big or heavy as to a particular pregnancy, do you do a Cesarean section based on that perception alone?

A No.

Q In fact, it's very difficult, no matter what mechanism is used, to accurately determine fetal weight, correct?

A Right. I don't think we can ever get an accurate fetal weight. We get estimated fetal weights.

However, I do take significant note when a patient states that "This baby feels much larger than any of my other children" or "heavier than any of my other children." That's usually -- Mom's perception is -- is intuitive. It does usually carry merit.

Q Would you want your practice as to whether you met the standard of care to be measured on a patient's memory of your prenatal care years after a traumatic delivery?

MS. MACHLER: Object to the form.

THE WITNESS: Do I still answer that?

MS. MACHLER: Yes.

Exhibit – O

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF LEWIS

SCOTT HAMILTON, as guardian ad litem for Z.H., Plaintiffs, v. LINDA AMONDSON-MULLER, Personal Representative of the ESTATE of LAURA HAMILTON, Defendants.	No. 20-2-00543-21

Videotaped Videoconference Deposition of

SANDRA WILKINSON, CNM, RNP, SANE-P

Friday, March 25, 2022

REPORTED BY: Kyle Ridenour,
RSR, CCR 21033678

Job No. 848373

problem here?"

She missed the mother saying "This is a big baby." I mean, a woman who's 4-10 with a baby that's 10-3, you're going to know, you know, just looking at the poor woman. If the woman's 6-2 with a big baby? Easier to miss for sure.

She also missed -- of course, she missed the anticipated size of the baby. She missed -- well, measuring the fundus. Now, she said she did. The mother and father said she only did it on her last visit. So that's a question.

She also fell out of the standard of care as to checking for gestational diabetes. Random blood sugar has never been the standard of care. It has a high -- a low sensitivity, a low specificity for gestational diabetes. So she missed that.

So she missed a lot of -- in the prenatal. But, truly, it was the delivery.

Q Do you have an opinion whether or not Mrs. Hamilton had gestational diabetes with her pregnancy with Zach?

A From reading the deposition, I understand that she developed class -- non-insulin dependent diabetes after her pregnancy; so it raises the concern that it occurred during her pregnancy. She had a family history

of diabetes. Asian women, they have a much higher chance of diabetes. And then after her pregnancy, she is diabetic; so, yeah, it raises a concern that inadequate testing was done and that they missed -- she missed -- Midwife Hamilton missed the diabetes.

Q Do you have an opinion on a more-likely-than-not basis whether Ms. Hamilton had gestational diabetes during her pregnancy with Zach?

A Yes. Just what I said, actually. I think it's more than likely that she did have gestational diabetes -- based on her postpartum checks that she was diabetic. And, of course, gestational diabetes often continues postpartum, now, into -- not just pregnancy life.

And the size of the baby. Whereas her other babies were in the 7 pounds -- I think she had a 5-14. And even though she has a very tall husband, the literature reports that you might have a long baby but not necessarily a fatter baby with a taller husband.

Q Is there any literature in the human studies that correlates the size of a baby at birth with the size of the father?

A Yes. There is one. And actually I sent -- I think I sent you the abstract on that. I'm not sure if there are others or whether it was a one-off.

Q Did -- does -- did Kaiser use ultrasounds prenatally on every patient?

A Yes.

Q Did they use ultrasounds for size on every patient?

A If they had a history of gestational diabetes, yes.

Q Mrs. Hamilton did not have a history of gestational diabetes with the pregnancy of Zach, did she?

A We don't know. No test was done.

Q Well, with -- with her initial workup for Ms. Hamilton, there was no history of gestational diabetes in her previous pregnancies, was there?

A There was not.

Q At Kaiser, did you sometimes have women refuse a prenatal ultrasound?

A No.

Q Would you agree that shoulder dystocia is not predictable?

A Sometimes not predictable. You do have red flags that allow you to predict that it's a possibility. However, you are right. The small babies, the preterm babies can also have shoulder dystocia. The non-diabetic babies can have shoulder dystocia.

Exhibit – P

Chief Complaint

None

ED Treatment Team

Provider	Role	From	To	Phone	Pager
Duong Than, MD	Admitting Provider	--	--	[redacted]	[redacted]

Diagnosis

Diagnosis	Comment
Diet controlled gestational diabetes mellitus in third trimester	

ED Disposition

None

Progress Notes

Progress Notes by Duong Than, MD at 3/26/2016 16:24

Author: Duong Than, MD
Filed: 3/26/2016 16:24
Status: Signed

Service: Obstetrics
Date of Service: 3/26/2016 16:24
Editor: Duong Than, MD (Physician)

Author Type: Physician
Creation Time: 3/26/2016 16:24

Sengphachahn Joy Hamilton-Livingston
[redacted]
2/28/2016, by Last Menstrual Period .36w4d

Filed Vitals:

	01/26/16 1305
BP:	119/80
Pulse:	102
Temp:	36.1 °C (97 °F)
Resp:	19

Pt undergoing antenatal nonstress testing for
INDICATIONS: FETAL WELL BEING and
gestational diabetes mellitus
Baseline Variability: Moderate Variability 6-25 bpm
Accelerations: Two 15 x 15 in 20/40 minutes with accelerations
(Two 10 x 10 if appropriate for gestational age under 32 weeks.)
Decelerations: none
Assessment:reactive

Plan: Continue antenatal testing if routinely scheduled
Follow up in office as scheduled
Return to FBC for leaking, bleeding, contractions, or decreased fetal movement.

Signed by Duong Than, MD on 3/26/2016 16:24

Call Information

	Department	Center
1/26/2016 13:00	Wch Labor And Delivery Ip	WA SOUTHWEST

Call Documentation

No notes of this type exist for this encounter.

Encounter Messages

No messages in this encounter

Other Notes

No notes of this type exist for this encounter.

Exhibit – Q

SUPERIOR COURT OF WASHINGTON, LEWIS COUNTY

SCOTT HAMILTON, as guardian ad litem for Z.H., Plaintiff,	)
vs.	) 20-2-00543-21
LINDA AMONDSON-MULLER, Personal Representative of the Estate of Laura Hamilton, Defendant.	)

REMOTE DEPOSITION UPON ORAL EXAMINATION OF

MARY BURGESS

1:00 p.m.

APRIL 29, 2022

LYNDEN, WASHINGTON

(Via Zoom)

REPORTED BY: ELEANOR J. MITCHELL, RPR, CCR 3006

midwives should know?

A. Yes.

Q. And would you be concerned if a midwife did not know that?

A. Yes.

Q. And would your concern be related to the safety of the child?

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

Q. (BY MR. NEFF.) You can answer, Ms. Burgess. Sorry. I don't think I heard you come through.

A. Oh. Yes.

Q. So what about this next one? The question is [as read]: Can you injure a baby by applying too much traction during delivery?

Laura Hamilton's answer was [as read]: I don't know.

Did I read that right?

A. Yes.

Q. And then you wrote an arrow pointing towards her answer that says "yes," right?

A. Um-hmm. Yes, that's my opinion. You can injure a baby by applying too much traction during delivery.

Q. And would you be concerned if a midwife did

not know that you could injure a baby by applying too much traction during delivery?

A. Yes.

Q. And why would you be concerned about that?

A. Again, the -- trying to work to do skills to get the baby delivered as safely as possible.

Q. And would not knowing that you could injure a baby by applying too much traction inhibit the ability to safely deliver the baby?

MS. MONIZ: Object to the form.

A. Can you ask that again, please?

Q. (BY MR. NEFF.) I'll rephrase it. It was a bad question.

Would not -- if a midwife doesn't know they could injure a baby by applying too much traction during delivery, would you be concerned that that's a safety issue?

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

A. Yes.

Q. (BY MR. NEFF.) And scrolling down, it looks like you made a notation over here [as read]: Four-foot-nine. Right?

A. Um-hmm.

Q. Is that what that says?

A. Yes.

Q. And then you circled some testimony about the weight of the baby. What was the purpose of these notations?

A. Just highlighting how big was the baby, how long was the baby, how tall was the mother.

Q. Do you agree that a woman's body can make a baby that is too large for her to safely deliver vaginally?

A. Yes.

Q. Have you seen that in your work as a midwife?

A. I have seen large babies born. Or I -- let me back up, please.

I -- I know that mothers can grow very large babies, and it, at some point, makes it very hard on the mother, yes.

Q. So what do you do if you're in that situation, and you as a midwife suspect the baby inside the mother is too large to be safely delivered vaginally?

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

A. I would refer to an OB.

Q. (BY MR. NEFF.) And why would you refer to an OB?

A. For a second opinion, sometimes. Sometimes,

was delivered ROA. And the brachial plexus injuries generally happen on the shoulder that was underneath the pubic bone.

The way that baby was in the mother, it was the left shoulder that was underneath the pubic bone. The right shoulder was not impacted by the pubic bone.

And in the supplemental articles that I mentioned and also the testimony from -- oh, goodness -- the nurse -- I can't remember what her name is at the moment, one or two of the other expert witnesses -- is that the chances of brachial plexus injury happening on the posterior shoulder is very, very small.

Q. And what do you believe qualifies you to offer that opinion to a jury?

A. As a licensed midwife with, you know, births under my belt and knowledge and ongoing learning, both through this -- the readings of this case, I believe I do have knowledge and -- and expertise that can vouch for the work that she did.

Q. Do you agree that -- if a midwife has any doubt about their ability to safely deliver a baby, that they should refer that baby's mother to the hospital for birth?

MS. MONIZ: Object to the form.

A. Can you restate in a different way?

Q. (BY MR. NEFF.) Do you agree that, if a midwife has any doubt about their ability to safely deliver a baby at home, they should refer the baby's mother to the hospital for birth?

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

A. I'm having a hard time answering this one because I don't think I understand exactly what you're asking.

Q. (BY MR. NEFF.) Let's try it this way: If you're working as a midwife and you have a doubt that you're going to be able to safely deliver the baby at home, should you refer that baby and the mother to the hospital for birth?

MS. MONIZ: Object to the form of the question. It's an improper standard.

Q. (BY MR. NEFF.) You can answer the question. Ms. Burgess.

MS. MONIZ: You can answer if you understand it as phrased. And you can answer it in your own words.

A. I believe that it's prudent -- if a midwife thinks that she can't deliver a baby at home, I believe that it's prudent to refer that baby to a higher level

an expert witness.

A. I don't know that I can answer that.

Q. (BY MR. NEFF.) Okay.

MR. NEFF: And, Donna, I -- I have to ask you: You've been very -- you've done a good job so far of not making speaking objections, but if you're going to do that and coach the witness, then we're going to have a problem.

So please just make your objections to form. I -- you know, if she starts answering based on your objections, we're going to have to stop the deposition.

MS. MONIZ: Mr. Neff, you're going to need to ask questions that don't request her opinion about the whole legal system. That's not a proper question to an expert. So let's -- let's explore her opinions and go from there.

MR. NEFF: I would just ask that you make your objection to form and don't use a speaking objection to coach an answer. That's my concern.

Q. (BY MR. NEFF.) 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?

MS. MONIZ: Object to the form of the question. Improper standard.

A. There's -- there's no insurance there. Each birth holds every possibility each time. There is many -- many reasons a woman might seek out midwifery care: A more-personal touch; longer appointments; during COVID, they could have their husbands with them; and they want -- they don't like hospitals. There's lots of reasons -- you know, to reduce interventions, all of that stuff.

But at no point can anyone ensure a safe delivery.

Q. (BY MR. NEFF.) Well, a midwife wants to ensure that a delivery is as safe as possible, right?

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

A. A midwife will use all her skills and knowledge to help deliver the baby given the circumstances at hand.

Q. (BY MR. NEFF.) So that's not quite my question.

My question is: Do you agree that a midwife should try to ensure that labor and delivery is as safe as possible?

MS. MONIZ: Object to the form of the question. It's an improper question. It's been asked and answered.

MR. NEFF: It hasn't been answered. But...

MR. MONIZ: It has been answered. You just don't like the answer, Mr. Neff.

Q. (BY MR. NEFF.) You can answer, Ms. Burgess.

A. Can you ask it one more time?

Q. Do you agree that a midwife should make sure that labor and delivery is as safe as possible?

MS. MONIZ: Object to the form of the question. Improper standard, asked and answered.

THE WITNESS: Do I answer?

Q. (BY MR. NEFF.) Yes.

MS. MONIZ: If you can, you can answer -- if you're able to answer his question. You've already done it, but yeah, go ahead.

A. Again, there's no assurance that the baby -- of safety for any provider for any birth in any situation. Birth holds all possibilities.

A midwife will use all her skills, all her knowledge, all her years of training to do everything in her power in that moment, given the circumstances, to deliver the baby and -- while reducing risks all along the way.

Q. (BY MR. NEFF.) You said it should be every midwife's goal to make sure that labor and delivery is

as safe as possible?

MS. MONIZ: Objection. Same question, same objection, wrong standard.

A. Again, I -- I think midwives -- the job is -- I don't know how else to say it: There's no guarantees. This is birth. If there's one thing in life that has all -- all possibilities each time, it's birth. It's a total wild card each time.

So her job is to care for the woman, the baby as best she can; to transfer appropriately; to, you know, do everything in her knowledge and ability to deliver the baby with as few risks as possible.

Q. (BY MR. NEFF.) I can live with that answer.

A. Okay.

Q. How many years have you worked as a midwife, Ms. Burgess?

A. Seven.

Q. And can you estimate for us how many babies you've delivered in your career as a midwife, so far?

A. Well, I've been in the birth world since just after my girls were born -- so for nearly 22 years, 21 years -- as -- in many roles: as a doula, as a student midwife, as an assistant midwife, as a primary midwife.

I can only estimate -- I haven't kept thorough

two people. And I like to have a set of hands that know what to do for each person, should anything be necessary.

It's also nice to have that second person who can do all the charting, which is one thing that she had to do after hers was write it all down afterwards. If you have an assistant, they're writing it down in the moment, and that's helpful.

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

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

A. I like to have that second set of hands. Again, just in case anybody needs anything, I've got another set of knowledgeable hands. It's not a student. It's someone with hands that know what to do, and we've all worked together many times.

Q. (BY MR. NEFF.) Is patient safety one of the reasons that you want a second set of hands in the birthing room?

MS. MONIZ: Object to the form of the question. Improper standard.

A. I -- I like to have as many resources available as possible, if anything's needed: Someone to draw up medicine, someone to help, you know...

Someone to write.

Q. (BY MR. NEFF.) So is safety not one of the reasons you reach out to another midwife or assistant during a birth?

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

A. I think to keep everyone as healthy as possible, it's help to have that second set of hands.

Q. (BY MR. NEFF.) And to keep them as safe as possible, too, right?

MS. MONIZ: Object to the form of the question. Asked and answered.

Q. (BY MR. NEFF.) You can answer, Ms. Burgess.

A. I don't know what to add to that -- to what I've already said.

Q. (BY MR. NEFF.) Fair enough. Let's switch to the Lynden Birth Center. Are there assistants at the Lynden Birth Center that help you deliver babies?

A. Yes.

Q. And are these assistants trained?

A. Again, they're licensed midwives. I would reach out into the community for -- for another midwife to come.

Q. When was the last time you delivered a baby without another midwife in the room to assist you?

Q. Okay. Have you ever referred a patient to a hospital for a birth during prenatal care because you were concerned the baby was going to be too big to deliver safely at home?

A. One -- once in particular, yep.

Q. What gave you those concerns?

A. Her fundal height was ginormous. It was more than 12 centimeters above her gestation and growing.

Q. Was that it, or was there anything else that concerned you?

A. I believe she was also developing high blood pressure, this mother.

Q. So were you concerned that she might have gestational diabetes?

A. She had -- she did not have gestational diabetes, according to the test that we did. I don't have her chart in front of me. But those were negative; that didn't seem to be it.

Q. How many times in your career have you referred a patient to the hospital during labor because of a complication?

A. Many times.

Q. More than ten?

A. Oh, yeah. Probably.

Q. More than...

Q. Of those six shoulder dystocias you encountered, what was the longest shoulder dystocia?

A. About two and a half minutes.

Q. How were you able to resolve that shoulder dystocia within two and a half minutes?

A. McRoberts didn't work. Flipped to hands and knees, tried to free the posterior shoulder, didn't work.

Put her back in McRoberts and used the suprapubic pressure, and then a corkscrew once I could get the shoulder free. I just kind of spiraled the baby out.

Q. And then the baby came free?

A. Yes.

Q. Do you agree that midwives are not qualified to deliver every baby?

A. Yeah. Oh, I think that there are some -- some women who should not be in midwifery care, yes.

But yes, midwives are not doctors. They don't do Cesareans. They don't do forceps. They don't do vacuums. They don't do any of that stuff.

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

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

A. I think that home birth is a perfect choice for -- for some women, and it's not for all women for a variety of reasons.

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

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

A. I think they're everything from personal choice to the distance from the hospital to the health of the mother. Certainly if there were concerns of the health of the mother or the baby, you know, then home birth is not the best choice.

Q. (BY MR. NEFF.) What's the difference between a high-risk pregnancy and a low-risk pregnancy?

MS. MONIZ: Objection. Vague.

A. That's a pretty broad question. High risk and low risk, I think that midwives do low-risk pregnancies and births. But there is a nice range of what falls within that low-risk category.

I think that, if things are outside of the -- of those realms, and it's anything from high blood pressure; diabetes; problems with the mother; problems with the baby; drug problems; STDs; you know, active herpes, like all -- all sorts of stuff could make somebody a high-risk pregnancy.

Exhibit - R

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, Vs. LINDA AMONDSON-MULLER, Personal Representative of the ESTATE of LAURA HAMILTON Defendants.	NO. 20-2-00543-21

Deposition of Cloie B. Johnson, M.Ed., A.B.V.E., C.C.M., via audio-visual conference, beginning at 10:00 am, on March 11, 2022, before Andie Evered, CCR CCR No. 2393

Job No. 848353

summary reflecting that Zach has a diminished earning capacity because of his injury; is that correct?

A. Because I've leveled it with the bachelor's degree. That's correct.

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

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

Q. Okay. Ms. Johnson, that wasn't my question. Would you please 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?

MS. MACHLER: Object to the form.

A. I believe my opinion is, as I've written it. Education and the tuition, 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.

BY MR. RAND:

Q. So you won't testify at trial that because of Zach's injury, more probably than not, he will earn less

during his lifetime; is that correct?

MS. MACHLER: Object to the form.

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

MS. MACHLER: You're arguing with her. It's argumentative. And it's been asked and answered, and asked and answered, and asked and answered.

BY MR. RAND:

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.

Q. Okay. If tuition, books and supplies were not included in your life care plan, would you be offering testimony that Zach's earning capacity during his lifetime is diminished because of his injury?

A. I would have grave concerns about his capacity to out-compete his uninjured peers in the ability to secure the education due to his incapacity to physically perform the duties most people would perform during their attempts to pay for their own college.

Q. Have you looked into any data about the percentage of students who work and pay their way during college versus those who obtain student loans and then

Exhibit - S

FILED
JUL 28 2017
DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re **SENGPHACHAHN J. LIVINGSTON,** Lawyer (Bar No. 37478).	Proceeding No. 16#00055 ODC File No(s). 14-00562 STIPULATION TO 21-MONTH SUSPENSION

Under Rule 9.1 of the Rules for Enforcement of Lawyer Conduct (ELC), and following a settlement conference conducted under ELC 10.12(h), the following Stipulation to 21-Month Suspension is entered into by the Office of Disciplinary Counsel (ODC) of the Washington State Bar Association (Association) through disciplinary counsel Marsha Matsumoto, Respondent's Counsel Anne I. Seidel, and Respondent lawyer Sengphachahn J. Livingston (Respondent).

Respondent understands that she is entitled under the ELC to a hearing, to present exhibits and witnesses on her behalf, and to have a hearing officer determine the facts, misconduct and sanction in this case. Respondent further understands that she is entitled under the ELC to appeal the outcome of a hearing to the Disciplinary Board, and, in certain cases, the Supreme Court. Respondent further understands that a hearing and appeal could result in an

OFFICE OF DISCIPLINARY COUNSEL OF THE
WASHINGTON STATE BAR ASSOCIATION
1325 4th Avenue, Suite 600
Seattle, WA 98101-2539
(206) 727-8207

808

outcome more favorable or less favorable to her. Respondent chooses to resolve this proceeding now by entering into the following stipulation to facts, misconduct and sanction to avoid the risk, time, and expense attendant to further proceedings.

I. ADMISSION TO PRACTICE

1. Respondent was admitted to practice law in the State of Washington on May 31, 2006.

II. STIPULATED FACTS

2. Respondent was a solo practitioner who practiced primarily in the area of personal injury law. Respondent practiced under the firm name, Livingston Law, LLC (Livingston Law).

3. Respondent maintained a trust account, ending in 3532, at JP Morgan Chase Bank (Chase Bank) for the deposit of client funds. Respondent made the first deposit to this trust account on December 4, 2013.

4. Respondent was the only authorized signer on the trust account.

5. Respondent maintained a business account, ending in 3870, at Chase Bank.

Trust Account Overdrafts

6. On March 19, 2014, check 7604 in the amount of $2,912 was presented for payment against insufficient funds in Respondent's trust account. At the time the check was presented, the balance in Respondent's trust account was $2,625.25. Check 7604 was dishonored and returned by Chase Bank.

7. The March 2014 overdraft occurred when Respondent disbursed more funds for client(s) than the client(s) had on deposit in the trust account.

8. On November 4, 2014, check 1093 in the amount of $2,711.25 was presented for payment against insufficient funds in Respondent's trust account. At the time the check was

OFFICE OF DISCIPLINARY COUNSEL OF THE
WASHINGTON STATE BAR ASSOCIATION
1325 4th Avenue, Suite 600
Seattle, WA 98101-2539
(206) 727-8207

presented, the balance in Respondent's trust account was $116.77. Check 1093 was dishonored and returned by Chase Bank.

9. The November 2014 overdraft occurred when Respondent disbursed funds for a client before depositing the client's funds to the trust account.

Trust Account Records

10. During the period December 4, 2013 through November 30, 2014, Respondent:

- did not maintain a contemporaneous, complete, or accurate check register or for trust account 3532;
- did not maintain contemporaneous, complete, or accurate client ledgers for trust account 3532;
- did not reconcile, monthly or quarterly, a check register to the bank statements for trust account 3532 (bank statement reconciliation);
- did not reconcile, monthly or quarterly, a check register to a combined total of client ledgers (client ledger reconciliation) for trust account 3532.

11. In November 2014, following the second overdraft of her trust account, Respondent hired Lewis County Tax and Bookkeeping (Lewis County Tax) to reconstruct the records for her trust account. Respondent states that, after the reconstruction was completed, she continued to employ Lewis County Tax to maintain her trust account records.

Client Settlement Funds

12. During the period November 2013 through September 2014, Respondent disbursed to her law firm client settlement funds that represented an insurance company's pro rata share of attorney's fees under Mahler v. Szucs, 135 Wn.2d 398, 957 P.2d 632 (1998) and related cases (Mahler fees).

13. Respondent disbursed the Mahler fees to her law firm, without entitlement to the funds.

14. In disbursing the Mahler fees to her law firm, Respondent accepted the incorrect advice of her non-lawyer assistant (Joseph Sim) that Mahler fees belong to the lawyer, not the

OFFICE OF DISCIPLINARY COUNSEL OF THE
WASHINGTON STATE BAR ASSOCIATION
1325 4th Avenue, Suite 600
Seattle, WA 98101-2539
(206) 727-8207

client.

15. During the period November 2013 through September 2014, Respondent disbursed to her law firm client settlement funds held back for subrogated interests and medical bills (holdback funds) when the insurance companies and medical providers waived or discounted reimbursement of the subrogated interests and medical bills.

16. Respondent disbursed the holdback funds to her law firm, without entitlement to the funds.

17. In disbursing the holdback funds to her law firm, Respondent accepted the incorrect advice of her non-lawyer assistant (Joseph Sim) that any holdback funds remaining after insurance companies and medical providers were paid belong to the lawyer, not the client.

18. Respondent did not provide her clients with written or other notice of her intent to disburse the Mahler fees or holdback funds to her law firm.

19. Respondent's clients did not authorize Respondent to disburse the Mahler fees or holdback funds to her law firm.

20. In 40 client matters, during the period November 2013 through September 2014, Respondent through her staff provided clients with settlements statements that did not accurately reflect how the clients' settlement funds were being disbursed. Because the settlement statements did not disclose that Respondent was taking the Mahler fees and holdback funds, the settlement statements overstated the amounts being paid to insurance companies and medical providers, and understated the amounts being paid to Respondent's firm.

21. Respondent did not provide her clients with corrected settlement statements or accurate written accountings showing how their funds were actually distributed, until April 2017.

OFFICE OF DISCIPLINARY COUNSEL OF THE
WASHINGTON STATE BAR ASSOCIATION
1325 4th Avenue, Suite 600
Seattle, WA 98101-2539
(206) 727-8207

22. In 38 client matters, Respondent disbursed approximately $55,000 more to her law firm than was permitted by her fee agreements. Respondent disbursed the funds by bank transfer from her trust account to her business account without entitlement to the funds. Respondent did so without adequately researching and investigating who was entitled to the funds.

Fee Splitting with Non-Lawyer

23. In 2011 or 2012, Respondent entered into an arrangement with non-lawyer Joseph Sim, who owned and operated Puget Sound Law Consultants (PSLC), to provide paralegal, marketing, and interpretation services.

24. Mr. Sim told Respondent that he had years of experience and had worked with other lawyers on personal injury cases.

25. Respondent entered into the arrangement with Mr. Sim because she wanted to learn personal injury law and develop a personal injury practice.

26. Under the arrangement, Respondent paid Mr. Sim half of the attorney's fees she received, plus PSLC's costs. Respondent also paid half of the wages of PSLC's employees.

27. During Respondent's arrangement with Mr. Sim, she primarily worked remotely from her home in Centralia. PSLC maintained an office in Lynnwood.

28. Mr. Sim and one or more PSLC employees spoke English and Korean. Mr. Sim marketed Respondent's legal services to the Korean community, and used his contacts to get personal injury clients for Respondent's law practice. Because Respondent did not speak or write Korean, Mr. Sim and PSLC employees were the main points of contact for clients whose primary language was Korean. In a number of instances where the client's primary language was Korean, Respondent never met or spoke directly with the client.

OFFICE OF DISCIPLINARY COUNSEL OF THE
WASHINGTON STATE BAR ASSOCIATION
1325 4th Avenue, Suite 600
Seattle, WA 98101-2539
(206) 727-8207

29. Mr. Sim and PSLC employees routinely prepared and signed fee agreements, negotiated with insurance companies and medical providers, prepared settlement statements, and prepared trust account checks. Respondent reviewed some of the settlement statements, but states that she did not understand them and accepted the incorrect advice of Mr. Sim that the settlement statements need not reflect the actual disbursements made from the settlement funds.

III. STIPULATION TO MISCONDUCT

30. By using client funds without entitlement to the funds, Respondent violated RPC 1.15A(b) and RPC 1.15A(c).

31. By failing to promptly deliver funds that clients were entitled to receive, Respondent violated RPC 1.15A(f).

32. By providing clients with inaccurate settlement statements through non-lawyer assistants, Respondent violated RPC 1.4(a), RPC 1.4(b), RPC 1.5(c)(3), and RPC 1.15A(e).

33. By charging and collecting an unreasonable fee, Respondent violated RPC 1.5(a).

34. By failing to maintain a complete, accurate, and contemporaneous check register for her trust account, Respondent violated RPC 1.15A(h)(2) and RPC 1.15B(a)(1).

35. By failing to maintain complete, accurate, and contemporaneous client ledgers, Respondent violated RPC 1.15A(h)(2) and RPC 1.15B(a)(2).

36. By failing to reconcile her trust account, Respondent violated RPC 1.15A(h)(6) and RPC 1.15B(a)(8).

37. By disbursing funds from her trust account before deposits cleared the banking process and were collected, Respondent violated RPC 1.15A(h)(7).

38. By failing to provide a written accounting to her clients after distributing their funds from her trust account, Respondent violated RPC 1.15A(e).

OFFICE OF DISCIPLINARY COUNSEL OF THE
WASHINGTON STATE BAR ASSOCIATION
1325 4th Avenue, Suite 600
Seattle, WA 98101-2539
(206) 727-8207

39. By sharing legal fees with a non-lawyer, Respondent violated RPC 5.4(a).

40. By failing to make reasonable efforts to ensure that the conduct of her non-lawyer assistants was compatible with her professional obligations as a lawyer, by ratifying the conduct of her non-lawyer assistants, and by failing to take reasonable remedial action, Respondent violated RPC 5.3(a), RPC 5.3(b), and RPC 5.3(c).

IV. PRIOR DISCIPLINE

41. Respondent has no prior discipline.

V. APPLICATION OF ABA STANDARDS

42. The following American Bar Association Standards for Imposing Lawyer Sanctions (1991 ed. & Feb. 1992 Supp.) applies to Respondent's use of client funds without entitlement and trust account violations:

> ***4.1 Failure to Preserve the Client's Property***
>
> 4.11 Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.
>
> 4.12 Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.
>
> 4.13 Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.
>
> 4.14 Admonition is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client.

43. Under the ABA Standards, "knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct, but without the conscious objective or purpose to accomplish a particular result. Respondent knew that Mahler fees and holdback funds were being disbursed to her law firm, and should have known that she was not entitled to the funds.

44. Respondent's conduct caused actual injury by denying her clients funds that they were entitled to receive.

OFFICE OF DISCIPLINARY COUNSEL OF THE
WASHINGTON STATE BAR ASSOCIATION
1325 4th Avenue, Suite 600
Seattle, WA 98101-2539
(206) 727-8207

45. The presumptive sanction for Respondent's use of client funds without entitlement is suspension under ABA Standard 4.12.

46. Respondent knew that she was not providing her clients with written accountings after disbursing their funds from trust. She should have known that she was not delivering funds that clients were entitled to receive. She knew or should have known that she was not maintaining adequate trust account records, was not reconciling her trust account, and was disbursing funds from trust before the corresponding deposit cleared the banking process.

47. Respondent's conduct caused injury in that client funds were not safeguarded in a trust account, clients were denied information about their funds, and Respondent was unable to track the ownership of funds in her possession due to the inadequacy of her records.

48. The presumptive sanction for these trust account violations is suspension under ABA Standard 4.12.

49. ABA Standard 4.1 also applies to Respondent's conduct in providing clients with inaccurate settlement statements:

50. Respondent should have known that she was improperly handling the settlement statements and improperly accounting for client settlement funds.

51. Respondent's conduct caused actual injury by withholding information from her clients and preventing them from discovering how their funds were used.

52. The presumptive sanction is suspension under ABA Standard 4.12.

53. The following ABA Standard applies to Respondent's conduct in charging an unreasonable fee, fee splitting with a non-lawyer, and failing to supervise non-lawyer assistants.

7.0 ***Violations of Duties Owed as a Professional***

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving false or misleading communication about the lawyer or the

OFFICE OF DISCIPLINARY COUNSEL OF THE
WASHINGTON STATE BAR ASSOCIATION
1325 4th Avenue, Suite 600
Seattle, WA 98101-2539
(206) 727-8207

lawyer's services, improper communication of fields of practice, improper solicitation of professional employment from a prospective client, unreasonable or improper fees, unauthorized practice of law, improper withdrawal from representation, or failure to report professional misconduct.

7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

7.3 Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

7.4 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence that is a violation of a duty owed as a professional, and causes little or no actual or potential injury to a client, the public, or the legal system.

54. Respondent acted knowingly when she participated in a fee sharing arrangement with non-lawyer Joseph Sim, failed to supervise Mr. Sim and PSLC staff, and charged an unreasonable fee.

55. Respondent's conduct in failing to supervise non-lawyer assistants and charging an unreasonable fee caused injury in that clients were given inaccurate information about the distribution of their settlement funds and charged fees they did not owe.

56. The presumptive sanction is suspension under ABA Standard 7.2.

57. With respect to all of the above, Respondent's conduct reflects poorly on the profession and diminishes public confidence in the legal system.

58. The following aggravating factors apply under ABA Standard 9.22:

(c) a pattern of misconduct; and
(d) multiple offenses.

59. The following mitigating factors apply under ABA Standard 9.32:

(a) absence of a prior disciplinary record;
(c) personal or emotional problems (family and health issues, see Confidential Attachment A to this Stipulation);

OFFICE OF DISCIPLINARY COUNSEL OF THE
WASHINGTON STATE BAR ASSOCIATION
1325 4th Avenue, Suite 600
Seattle, WA 98101-2539
(206) 727-8207

(g) character or reputation (Respondent provided letters from two lawyers who describe Respondent's practice in criminal and family law matters as competent, dedicated, reliable, and trustworthy); and

(l) remorse (Respondent has repeatedly acknowledged her mistakes and expressed remorse for her actions).

60. On balance, the aggravating and mitigating factors do not require a departure from the presumptive sanction of suspension, but warrant a 21-month suspension.

VI. STIPULATED DISCIPLINE

61. The parties stipulate that Respondent shall receive a 21-month suspension for her conduct.

62. Respondent's reinstatement from suspension is conditioned upon Respondent's fulfillment of the requirements set forth in Confidential Attachment B to this Stipulation.

63. Respondent will be subject to probation for a period of two years commencing upon Respondent's reinstatement to the practice of law, with periodic reviews under ELC 13.8 of her trust account practices, and shall comply with the specific probation terms set forth below:

a) Respondent shall carefully review and fully comply with RPC 1.15A and RPC 1.15B, and shall carefully review the current version of the publication, Managing Client Trust Accounts: Rules, Regulations, and Common Sense.

b) For all client matters, Respondent shall have a written fee agreement signed by the client, which agreements are to be maintained for least seven years, regardless of whether RPC 1.15B(a)(3) requires that a fee agreement be maintained. A "client matter" does not include: 1) representation by Respondent of her employer if Respondent is serving as in-house counsel, or 2) representation by Respondent of another lawyer's client if Respondent does not receive, hold, or disburse funds in connection with the representation.

c) On a monthly basis, using ODC's form report entitled "Monthly Reconciliation and Review Report," Respondent shall review the trust-account records detailed on the form report, review the completed report, and sign and date the completed report.

d) On a quarterly basis, Respondent shall provide ODC's audit staff with all trust-account records for the time period to be reviewed by ODC's audit staff and disciplinary counsel for compliance with the RPC:

OFFICE OF DISCIPLINARY COUNSEL OF THE
WASHINGTON STATE BAR ASSOCIATION
1325 4th Avenue, Suite 600
Seattle, WA 98101-2539
(206) 727-8207

i) Months 1 – 3. By no later than the 30th day of the fourth month after the commencement of probation, Respondent shall provide the trust account records from the date of commencement of probation to the end of the third full month.

ii) Months 4 – 6. By no later than the 30th day of the seventh month after the commencement of probation, Respondent shall provide the trust account records from the end of the previously provided quarter through the end of month six.

iii) Months 7 – 9. By no later than the 30th day of the tenth month after the commencement of probation, Respondent shall provide the trust account records from the end of the previously provided quarter through the end of month nine.

iv) Months 10 – 12. By no later than the 30th day of the thirteenth month after the commencement of probation, Respondent shall provide the trust account records from the end of the previously provided quarter through the end of month twelve.

v) Months 13– 15. By no later than the 30th day of the sixteenth month after the commencement of probation, Respondent shall provide the trust account records from the end of the previously provided quarter through the end of month fifteen.

vi) Months 16 – 18. By no later than the 30th day of the nineteenth month after the commencement of probation, Respondent shall provide the trust account records from the end of the previously provided quarter through the end of month eighteen.

vii) Months 19 – 21. By no later than the 30th day of the twenty-second month after the commencement of probation, Respondent shall provide the trust account records from the end of the previously provided quarter through the end of month twenty-one.

The trust account records Respondent provides to ODC for each quarterly review of her trust account will include: (a) copies of each completed "Monthly Reconciliation and Review Report" referenced in sub-paragraph(c) above, (b) a complete checkbook register for her trust account covering the period being reviewed, (c) complete individual client ledger records for any client with funds in Respondent's trust account during all or part of the period being reviewed, as well as for Respondent's own funds in the account (if any), (d) copies of all trust-account bank statements, deposit slips, and cancelled checks covering the period being reviewed, and (e) copies of all trust account client ledger reconciliations for the period being reviewed. The ODC's Audit Manager or designee will review Respondent's trust account records for each period.

OFFICE OF DISCIPLINARY COUNSEL OF THE
WASHINGTON STATE BAR ASSOCIATION
1325 4th Avenue, Suite 600
Seattle, WA 98101-2539
(206) 727-8207

If Respondent does not maintain a trust account, Respondent will provide a signed declaration stating that she does not maintain a trust account and does not handle client funds.

If Respondent is employed by a law firm that maintains a trust account, but she is not responsible for making deposits or disbursements or maintaining the trust account records, Respondent will provide a signed declaration so stating and identifying the institution where the trust account is maintained, the account number, and the name(s) of the lawyer(s) responsible for making deposits, disbursements and maintaining the trust account records.

e) On the same quarterly time schedule set forth in the preceding paragraph, Respondent will provide ODC's Audit Manager or designee with copies of any and all fee agreements entered into within the time period at issue.

f) The ODC's Audit Manager or designee may request additional financial or client records if needed to verify Respondent's compliance with RPC 1.15A and/or 1.15B. Within twenty days of a request from ODC's Audit Manager or designee for additional records needed to verify Respondent's compliance with RPC 1.15A and/or RPC 1.15B, Respondent will provide ODC's Audit Manager or designee the additional records requested.

g) Respondent will reimburse the Association for time spent by ODC's Audit Manager or designee in reviewing and reporting on Respondent's records to determine her compliance with RPC 1.15A and RPC 1.15B, at the rate of $85 per hour. Respondent will make payment within thirty days of each written invoice setting forth the auditor's time and payment due.

VII. RESTITUTION

64. Prior to the execution of this Stipulation, Respondent paid restitution to the individuals and in the amounts set forth in Confidential Attachment C to this Stipulation. These amounts may differ from those listed in the Formal Complaint based on documents Respondent provided to ODC.

VIII. COSTS AND EXPENSES

65. In light of Respondent's willingness to resolve this matter by stipulation at an early stage of the proceedings, Respondent shall pay attorney fees and administrative costs of $2,160 in accordance with ELC 13.9(i). The Association will seek a money judgment under ELC

OFFICE OF DISCIPLINARY COUNSEL OF THE
WASHINGTON STATE BAR ASSOCIATION
1325 4th Avenue, Suite 600
Seattle, WA 98101-2539
(206) 727-8207

13.9(*l*) if these costs are not paid within 30 days of approval of this stipulation.

IX. VOLUNTARY AGREEMENT

66. Respondent states that prior to entering into this Stipulation she has consulted independent legal counsel regarding this Stipulation, that Respondent is entering into this Stipulation voluntarily, and that no promises or threats have been made by ODC, the Association, nor by any representative thereof, to induce the Respondent to enter into this Stipulation except as provided herein.

67. Once fully executed, this Stipulation is a contract governed by the legal principles applicable to contracts, and may not be unilaterally revoked or modified by either party.

X. LIMITATIONS

68. This Stipulation is a compromise agreement intended to resolve this matter in accordance with the purposes of lawyer discipline while avoiding further proceedings and the expenditure of additional resources by the Respondent and ODC. Both the Respondent and ODC acknowledge that the result after further proceedings in this matter might differ from the result agreed to herein.

69. This Stipulation is not binding upon ODC or the Respondent as a statement of all existing facts relating to the professional conduct of the respondent lawyer, and any additional existing facts may be proven in any subsequent disciplinary proceedings.

70. This Stipulation results from the consideration of various factors by both parties, including the benefits to both by promptly resolving this matter without the time and expense of hearings, Disciplinary Board appeals, and Supreme Court appeals or petitions for review. As such, approval of this Stipulation will not constitute precedent in determining the appropriate sanction to be imposed in other cases; but, if approved, this Stipulation will be admissible in

OFFICE OF DISCIPLINARY COUNSEL OF THE
WASHINGTON STATE BAR ASSOCIATION
1325 4th Avenue, Suite 600
Seattle, WA. 98101-2539
(206) 727-8207

subsequent proceedings against Respondent to the same extent as any other approved Stipulation.

71. Under ELC 9.1(d)(4), the Disciplinary Board reviews a stipulation based solely on the record agreed to by the parties. Under ELC 3.1(b), all documents that form the record before the Board for its review become public information on approval of the Stipulation by the Board, unless disclosure is restricted by order or rule of law.

72. If this Stipulation is approved by the Disciplinary Board and Supreme Court, it will be followed by the disciplinary action agreed to in this Stipulation. All notices required in the Rules for Enforcement of Lawyer Conduct will be made.

73. If this Stipulation is not approved by the Disciplinary Board and Supreme Court, this Stipulation will have no force or effect, and neither it nor the fact of its execution will be admissible as evidence in the pending disciplinary proceeding, in any subsequent disciplinary proceeding, or in any civil or criminal action.

WHEREFORE the undersigned being fully advised, adopt and agree to this Stipulation to Discipline as set forth above.

Dated: 05/15/2017

Senghnehahn J. Livingston, Bar No. 37478
Respondent

Dated: 5/15/17

Anne I. Seidel, Bar No. 22742
Counsel for Respondent

Dated: 5/11/17

Marsha Matsumoto, Bar No. 15831
Managing Disciplinary Counsel

OFFICE OF DISCIPLINARY COUNSEL OF THE
WASHINGTON STATE BAR ASSOCIATION
1325 4th Avenue, Suite 600
Seattle, WA 98101-2539
(206) 727-8207

FILED
JUL 27 2017
DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re **SENGPHACHAHN J. LIVINGSTON,** Lawyer (WSBA No. 37478)	Proceeding No. 16#00055 AMENDED ORDER APPROVING STIPULATION TO 21-MONTH SUSPENSION AND GRANTING PROTECTIVE ORDER

This matter came before the Disciplinary Board for approval of a stipulation to 21-month suspension. On review of the May 15, 2017, Stipulation to 21-Month Suspension,

IT IS ORDERED that:

1. The Stipulation is approved.[1]
2. The Parties' request for a protective order is granted. Attachments A, B, and C to the Stipulation are confidential and shall be filed under seal pursuant to ELC 3.2(e).

Dated this 27th day of July, 2017.

Michele Carney
Disciplinary Board Chair

CERTIFICATE OF SERVICE

I certify that I caused a copy of the amended order approving 21-month suspension and granting protective order to be delivered to the Office of Disciplinary Counsel and to be mailed to [redacted], Respondent/~~Respondent's Counsel~~ at [redacted] by Certified/first class mail, postage prepaid on the 27th day of July, 2017.

Clerk/Counsel to the Disciplinary Board

[1]The vote on this matter was unanimous. Those voting were: Carney, Silvernan, Louvier, Startzel, Byerly, Cottrell, Patneaude, Myers and Cornelius.

WASHINGTON STATE BAR ASSOCIATION
1325 4th Avenue, Suite 600
Seattle, WA 98101-2539
(206) 727-8207

007

Exhibit - T

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

SCOTT HAMILTON, as guardian ad litem for Z.H., Plaintiffs, vs. LINDA AMONDSON-MULLER, Personal Representative of the ESTATE of LAURA HAMILTON, Defendants.	NO. 20-2-00543-21 PLAINTIFF'S **AMENDED** DISCLOSURE OF POSSIBLE FACT, EXPERT AND REBUTTAL WITNESSES

COMES NOW the Plaintiff, by and through their counsel, and hereby submit this Disclosure of Possible Fact and Expert Witnesses.

LAY WITNESSES

1. Scott and Seng Hamilton
   c/o Osborn Machler
   2025 First Avenue, Suite 1140
   Seattle, WA 98121

Mr. and Mrs. Hamilton are the parents of plaintiff Z.H., a minor. They will be called to testify regarding the claims and allegations in the Complaint, the treatment provided, the injuries giving rise to the above-captioned lawsuit, plaintiff Z.H.'s medical care and treatment, the parents' conversations and interactions with defendant Laura Hamilton, and all injuries and damages in this case.

OSBORN MACHLER
2025 1st Ave., Ste. 1140
Seattle, WA 98121
206-441-4110 (Tel)
206-441-4220 (Fax)

2. Plaintiffs may call family and friends to testify regarding their knowledge of the plaintiff's conditions, the treatment giving rise to this lawsuit, plaintiff's injuries and damages, and other issues relevant to this case. These witnesses include, but not limited to:

Annette Bleuler (Livingston)
835 76th Ave NE
Olympia, WA 98506
DOB 06/04/1965
(360) 888-0400

Cheryl White
8005 188th Ave SW
Rochester, WA 98579
DOB 12/14/1976
(360) 269-4155

JoAnn Hamilton
P.O. Box 678
Centralia, WA 98531
(425) 829-0919

Amy Scholfield
1002 G. Street
Centralia, WA 98531
12/31/1976
(360) 388-6495

Erin Livingston
3984 47th Ave NE, Salem, OR 97305

Lilly Gress
197 Big Hanaford Rd. Centralia, WA 98531

Lacey Gress
197 Big Hanaford Rd. Centralia, WA 98531

Khamsone Damneun (Seng's father)
Setsamay Visetsinh (Seng's stepmom)
1709 North Tower
Centralia, WA 98531
(360) 388-5598

OSBORN MACHLER
2025 1st Ave., Ste. 1140
Seattle, WA 98121
206-441-4110 (Tel)
206-441-4220 (Fax)

Ray Wasson (Work friend)
Address Will be Supplemented
Aberdeen, WA
(360) 593-1272

Angela Lamb, R.N.
Providence Centralia Hospital
914 S Scheuber Road
Centralia, WA 98531

Angela Lamb is a registered nurse at Providence Centralia Hospital. Ms. Lamb will testify in rebuttal to any character evidence put forth by defense witnesses suggesting that Laura Hamilton was a good, prudent, or careful midwife. If this door is opened, Ms. Lamb will testify as to Laura Hamilton's reputation in the Lewis County medical community. Ms. Lamb will also testify about specific instances in which Providence Centralia Hospital staff took over care of Laura Hamilton's patients due to issues occurring under her care.

Katie Ulmer

Ms. Ulmer was Laura Hamilton's bookkeeper and administrative assistant at the time care was provided to Seng Hamilton and Z.H. Ms. Ulmer will testify as to her knowledge of the facts surrounding this case.

Shannon Smith

Ms. Smith was Laura Hamilton's mentee and care assistant at the time care was provided to Seng Hamilton and Z.H. Ms. Smith will testify as to her knowledge of the facts surrounding this case.

In addition, plaintiffs may call care givers and/or teachers who have witnessed Z.H. and may testify to Z.H.'s day-to-day struggles he has due to his injuries:

Daycare: Margaret's Care A Lot
1216 N. Tower Rd, Centralia, WA 98531
(360) 736-8532

OSBORN MACHLER
2025 1st Ave., Ste. 1140
Seattle, WA 98121
206-441-4110 (Tel)
206-441-4220 (Fax)

Dells Daycare Center
1212 North Pearl St.
Centralia, WA 360 736 9964

Pre-School: Ford's Prairie Elementary School
1620 Harrison Ave, Centralia, WA 98531
(360) 330-7633

Elementary: Oakview Elementary
201 E. Oakview Ave, Centralia, WA 9853
(360) 330- 7638.

TREATING HEALTHCARE PROFESSIONALS

3. Any and all health care providers who provided care and treatment to plaintiff Z.H., including but not limited to the individuals and facilities identified below:

Isaac S. Pope, M.D.
Pope's Kids' Place
230 Washington Way
Centralia, WA 98531
(360) 736-9147

Valley View Health Center
Centralia Pediatrics
220 Washington Way
Centralia, WA 98531-9325
(360) 388-3259

Andrew Nguyen
Rachelle Peterson, MS
Sheryl Dean
Centralia Providence Hospital
914 S. Scheuber Road
Centralia, WA 98531
(360) 330-8720
[Physical and Occupational Therapy]

Seattle Children's Hospital
4800 Sand Point Way N.E.
Seattle, WA 98105
(206) 987-2000
[All treating physicians]

OSBORN MACHLER
2025 1st Ave., Ste. 1140
Seattle, WA 98121
206-441-4110 (Tel)
206-441-4220 (Fax)

Representative @ Washington State Department of Health

Plaintiffs reserve the right to call any or all health care providers who treated, diagnosed, or cared for plaintiff at any point in time, whether or not they are currently disclosed through discovery, or will be disclosed through discovery in the future. It is expected that such health care providers will testify as to their care and treatment of plaintiff Z.H., the nature and extent of plaintiff's conditions, and may testify regarding causation or damage issues. They may also respond to any issues raised by defendants or defendants' experts. This testimony may involve both fact and expert opinion testimony and will be based on the witness' knowledge, experience, training, and education in the health care field, along with their knowledge of the events in question and their own participation in, and recollections of, plaintiff Z.H.'s care and treatment. One or more of the treating health care providers will testify as to the reasonableness and necessity of the medical treatment and that the charges for the medical care were reasonable.

Custodians of records for the facilities identified above may also be called to testify as to the completeness and authenticity of records in their custody and control.

EXPERT WITNESSES

4. Hindi E. Stohl, MD, JD
1000 West Carson Avenue
Box 3-7 West
Torrance, CA 90502
(310) 222-3561

Dr. Hindi Stohl is a board-certified obstetrician/gynecologist. Dr. Stohl may testify regarding the care provided, injuries, damages, and opinions held regarding Z.H. She may address all issues raised by treating providers and defense experts. Dr. Stohl's deposition has been taken by the defense.

OSBORN MACHLER
2025 1st Ave., Ste. 1140
Seattle, WA 98121
206-441-4110 (Tel)
206-441-4220 (Fax)

Dr. Stohl may testify regarding the standard of care expected of a reasonable healthcare provider providing care during labor and delivery and the cause of Z.H.'s injuries and damages. Dr. Stohl may testify that the defendant lacked adequate understanding of shoulder dystocia and how to manage it correctly. The maneuvers performed by the defendant did not mitigate risk of injury during delivery and instead caused harm. The defendant required Seng Hamilton to push after the shoulder dystocia was diagnosed, which is the opposite of what the standard of care requires. The defendant used excessive force on the baby in a manner that fell below the standard of care. The defendant's prenatal care fell below the standard of care in ways testified to by Dr. Stohl in her deposition, including but not limited to failure to obtain an estimated fetal weight and failure to screen the mother for gestational diabetes. The defendant's treatment caused Z.H.'s injuries on a more probable than not basis. Dr. Stohl may testify regarding other matters consistent with her deposition testimony or if additional information is discovered.

Dr. Stohl has reviewed the relevant medical records of the plaintiff and may testify that the care provided to plaintiff by defendant Laura Hamilton did not meet the accepted standard of care, and proximately caused injury to plaintiff. Dr. Stohl's testimony may be based on upon her training, and experience, upon her review of the relevant medical records, and healthcare standards and medical/scientific literature. Dr. Stohl may also respond to any testimony or evidence presented by defendant's witnesses or experts. A copy of her CV has already been provided.

5. Sandra Wilkinson, CNM, RNP
1809 Shady Brook Drive
Thousand Oaks, CA 91362
(805) 444-2624

OSBORN MACHLER
2025 1st Ave., Ste. 1140
Seattle, WA 98121
206-441-4110 (Tel)
206-441-4220 (Fax)

Sandra Wilkinson, CNM, RNP, is certified nurse midwife, and nurse practitioner. Ms. Wilkinson may testify regarding care provided, injuries, damages, and opinions held regarding Zachary Hamilton. She may address all issues raised by treating provides and defense experts.

Ms. Wilkinson may testify regarding the standard of care expected of a reasonable and healthcare provider providing care during labor and delivery, and the cause of Z.H.'s injuries and damages. Ms. Wilkinson has reviewed the relevant medical records to the plaintiff, and may testify that the care provided to plaintiff by defendant Laura Hamilton did not meet the accepted standard of care, and proximately caused injury to plaintiff. Ms. Wilkinson's testimony may be based on upon her training, and experience, upon her review of the relevant medical records, and healthcare standards and medical/scientific literature. A copy of her CV has already been provided.

6. Brian Sollers, D.O.
1314 Mustang Ct.
Prosser, WA 99350
(650) 793-1273

Brian Sollers, DO is a board-certified Obstetrician/Gynecologist. Dr. Sollers may testify regarding the care provided, injuries, damages, and opinions held regarding Z.H. He may address all issues raised by treating providers and defense experts.

Dr. Sollers may testify that the defendant used excessive force in delivering Z.H. and that she failed to use the appropriate maneuvers for responding to shoulder dystocia. The defendant asked Seng Hamilton to continue pushing after the shoulder dystocia became apparent. The defendant failed to screen the mother for gestational diabetes, especially given her family history. Her prenatal care fell below the standard of care in ways that Dr. Sollers testified about in his deposition.

OSBORN MACHLER
2025 1st Ave., Ste. 1140
Seattle, WA 98121
206-441-4110 (Tel)
206-441-4220 (Fax)

Dr. Sollers may testify regarding the standard of care expected of a reasonable and healthcare provider providing care during labor and delivery, and the cause of Z.H.'s injuries and damages. Dr. Sollers has reviewed the relevant medical records of the plaintiff and may testify that the care provided to plaintiff by defendant Laura Hamilton did not meet the accepted standard of care, and proximately caused injury to plaintiff. Dr. Sollers's testimony may be based on upon his training, and experience, upon his review of the relevant medical records, and healthcare standards and medical/scientific literature. A copy of his CV has already been provided.

7. Edith D. Gurewitsch Allen, MD, MBA, Med., FACOG
222 East 82nd Street, 2C
New York, NY 10028
(443) 766-9117

Dr. Edith D. Gurewitsch Allen is a board-certified Obstetrician/ Gynecologist. Dr. Allen may testify regarding the care provided, injuries, damages, and opinions held regarding Z.H. She may address all issues raised by treating providers and defense experts.

Dr. Allen may testify regarding the standard of care expected of a reasonable and healthcare provider providing care during labor and delivery, and the cause of Z.H.'s injuries and damages. Dr. Allen's testimony will focus on the standard of care for managing a shoulder dystocia that is the standard of care for every medical provider who delivers babies. Proper management is taught at every level, including midwives at home births. She will testify that a provider's actions make a difference in whether there is a resulting brachial plexus injury. Research shows that training and rehearsal for managing a shoulder dystocia results in fewer brachial plexus injuries. She will testify that the natural forces of labor do not cause brachial plexus avulsions because of the anatomy of the brachial plexus nerves and that pulling and

OSBORN MACHLER
2025 1st Ave., Ste. 1140
Seattle, WA 98121
206-441-4110 (Tel)
206-441-4220 (Fax)

twisting on the baby's head are required to cause avulsions. The nature and extent of the injuries in this case tells us how much force was used. At least four times the force was used that should be used within the standard of care and maybe up to 10 times.

Dr. Allen will also testify that the force used in this case was not justified. The shoulder dystocia was at most approximately 5 minutes, and the baby was revived with a few puffs and without brain damage. Laura Hamilton put both hands on the baby's head and pushed downward, both of which are incorrect. She turned his head which is also incorrect. She also used her body weight to pull on the baby. The facts of the injury tells what happened that the negligent care caused the brachial plexus injuries.

Dr. Allen has reviewed the relevant medical records of the plaintiff and may testify that the care provided to plaintiff by defendant Laura Hamilton did not meet the accepted standard of care, and proximately caused injury to plaintiff. Dr. Allen's testimony may be based on upon her training, and experience, upon her review of the relevant medical records, and healthcare standards and medical/scientific literature. A copy of her CV has already been provided.

Dr. Allen's deposition has already been taken and her testimony may have additional opinions consistent to said deposition.

8. Lorne Sheldon Label, MD, MBA, FAAN, CPE
1977 Millville Court
Thousand Oaks, CA 91360
(818) 590-6436

Dr. Label is a pediatric neurologist. He will testify regarding Z.H.'s injuries, disabilities, prognosis, and treatment. He will also testify regarding causation. Dr. Label will testify that pulling or other force by the delivering midwife was the cause of Z.H.' s injuries on a more probable than not basis. He will testify that Z.H's injuries are permanent and leave him with

OSBORN MACHLER
2025 1st Ave., Ste. 1140
Seattle, WA 98121
206-441-4110 (Tel)
206-441-4220 (Fax)

significant disabilities. He may have other opinions consistent with his deposition. Dr. Label's testimony may be based on his training, experience, upon his review of the relevant medical records, and medical/scientific literature. A copy of his CV has already been provided.

9. Robert Harry Allen, Ph.D.
222 East 82nd Street, Apt. 2C
New York, NY 10027
(410) 303-9323

Dr. Allen holds a Ph.D. in engineering and is technical director at Birth Injury Prevention, LLC. He will testify regarding how brachial plexus injuries occur during birth from force applied by the health care provider. He may testify regarding the mechanics or physics of nerve injury in general and specifically regarding nerve injuries following shoulder dystocia. He may testify regarding the natural forces of labor and its effect on the brachial plexus nerves. He will testify regarding the ACOG Neonatal Brachial Plexus Palsy publication and other studies regarding the causes of brachial plexus injuries during birth. He may also be called as a rebuttal witness to rebut the testimony of defense expert, Michelle Grimm. Dr. Allen's testimony may be based upon his training and experience and upon his review of the relevant medical records, deposition testimony, and medical/scientific literature. A copy of his CV is attached.

10. Michael D. Freeman, MD, PhD
4500 Kruse Way, Plaza I, Suite 385
Lake Oswego, OR 97035
(971) 255-1008

Michael D. Freeman, MD, PhD is board certified in forensic sciences. Dr. Freeman will be a rebuttal witness to defendant's witnesses. Dr. Freeman may testify regarding the epidemiology and biomechanical aspects of the theory of natural forces of labor. Dr. Freeman may address all issues raised by defense experts, including causation. Dr. Freeman's testimony may be based upon his training and experience, and upon his review of the relevant medical

OSBORN MACHLER
2025 1st Ave., Ste. 1140
Seattle, WA 98121
206-441-4110 (Tel)
206-441-4220 (Fax)

records, relevant deposition testimony, and medical/scientific literature. A copy of his CV has already provided.

11. Cloie B. Johnson, M.Ed, A.B.V.E., C.C.M.
10132 NE 185th Street
Bothell, WA 98011
(425) 486-4040

Cloie Johnson, M.Ed. is a certified vocational rehabilitation counselor and certified case manager with experience and expertise in rehabilitation and life care planning. Ms. Johnson may testify regarding care issues based on her review of medical records, and consultation with medical professionals in preparing a life care plan for plaintiff. Ms. Johnson may testify to her assessment of the needs of Z.H. for future care, medications, equipment, medical care, therapy, and all other needs and expenses. A copy of her CV has already been provided.

12. William G. Brandt, CPA, ABV, MBA, CFF
P.O. Box 10187
Bainbridge Island, WA 98110
(206) 201-3033

William G. Brandt, CPA, MBA, ABV, CFF is an economist. Mr. Brandt may testify about plaintiff Z.H.'s economic losses and damages, impairment of future earning capacity, present value of future care needs, and other economic losses. He may testify to an analysis of the life care plan of Cloie Johnson and the monetary value necessary for the use of the plan. A copy of his CV has already been provided.

13. Dr. Geraldine O'Mahony, Ph.D., M.A.
Douglas Honors College
Central Washington University
400 East University Way
Ellensburg, WA 98926

OSBORN MACHLER
2025 1st Ave., Ste. 1140
Seattle, WA 98121
206-441-4110 (Tel)
206-441-4220 (Fax)

Dr. Geraldine O'Mahony is a theologian and an Assistant Professor of Political Science at Central Washington University. Dr. O'Mahony will testify that bad medical outcomes have historically been viewed as acts of God. However, with the invention of modern medicine, this view is now antiquated and unsupported. Dr. O'Mahony will also testify that it does not make sense, theologically, to view bad medical outcomes as acts of God because doing so implies that medical outcomes are pre-determined, and the actions and non-actions of the medical provider are meaningless. Dr. O'Mahony will also testify that the Estate of Laura Hamilton has invoked God's name in vain to advance their own purposes, a tactic commonly used by dictators and political leaders in third-world countries.

14. Plaintiffs reserve the right to call any fact, expert, rebuttal, or impeachment witnesses as authorized or permitted by law and the schedule in this case.

15. Plaintiffs reserve the right to call any witnesses identified by defendants in this case, either through witness disclosures or identified through discovery. Plaintiffs therefore incorporates by reference the witness disclosures of all other parties in this case.

16. Plaintiffs maintain the right to full protection of all consulting expert witnesses as provided for by the Civil Rules, Local Rules, and applicable case law, including, but not limited to, prohibiting any party from using any deposition, or portions thereof, of any consulting expert not chosen by plaintiffs to be called as an expert witness to give testimony at trial.

17. Plaintiffs reserve the right to modify, supplement, and/or delete witnesses from this list, and/or identify additional witnesses that further discovery may reveal, or whose importance may be indicated by later responses to discovery or by relevant records produced or received. Discovery is ongoing in this matter and not yet completed.

OSBORN MACHLER
2025 1st Ave., Ste. 1140
Seattle, WA 98121
206-441-4110 (Tel)
206-441-4220 (Fax)

18. Plaintiffs reserve the right to modify, supplement, or and/or withdraw witnesses from this list pursuant to *Mothershead v. Adams*, 32 Wn. App. 325 (1982).

19. Should any expert witness be unable to testify due to scheduling conflicts or other issues, plaintiffs reserve the right to identify another expert of similar professional standing and qualifications to testify to the same subject matter.

20. Defendants may not make any ex-parte contact with any of the expert witnesses or those witnesses who are plaintiffs' health care providers, including attempts to schedule the depositions of these witnesses. All arrangements for depositions of these witnesses must be made through the attorneys for plaintiffs.

Dated this 17th day of May 2022.

OSBORN MACHLER

Susan Machler, WSBA #23256
Simeon J. Osborn, WSBA #14484
Austin Neff. WSBA #57059
Attorneys for Plaintiffs

OSBORN MACHLER
2025 1st Ave., Ste. 1140
Seattle, WA 98121
206-441-4110 (Tel)
206-441-4220 (Fax)

CERTIFICATE OF SERVICE

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

Attorneys for Defendant:
Donna Moniz
925 4th Ave, Ste. 2300
Seattle, WA 98104

☐ Via Electronic Filing
☐ Via Legal Messenger
☐ Via U.S. Mail
☒ Via E-Mail:
monizd@jgkmw.com; vasquezb@jgkmw.com; randp@jgkmw.com; sproulj@jgkmw.com
☐ Via Fax:

Dated this 17th day of May 2022 at Seattle, Washington.

Jenine K. Michaelis

Jenine Michaelis
Paralegal

OSBORN MACHLER
2025 1st Ave., Ste. 1140
Seattle, WA 98121
206-441-4110 (Tel)
206-441-4220 (Fax)

Exhibit - U

Pierce Rand

From: Donna Moniz
Sent: Friday, May 13, 2022 4:49 PM
To: Austin Neff; Pierce Rand; Jennifer Sproul
Cc: Susan Machler; Sim Osborn; Jenine Michaelis
Subject: RE: Hamilton Litigation - Deposition Dates for Ms. Smith and Ms. Ulmer

Austin, We have considered this and decided not to call them. We will rely on the records and Laura Hamilton's deposition testimony. Per Susan Machler's request, we are withdrawing them as defense witnesses. Have a good weekend! Donna

Donna M. Moniz

JGK M&W Johnson Graffe Keay Moniz & Wick LLP
When reputation matters

925 Fourth Avenue, Suite 2300
Seattle, WA 98104
Phone: (206) 223-4770
Fax: (206) 386-7344

From: Austin Neff <ANeff@osbornmachler.com>
Sent: Thursday, May 12, 2022 1:09 PM
To: Donna Moniz <monizd@JGKMW.com>; Pierce Rand <randp@JGKMW.com>; Jennifer Sproul <sproulj@JGKMW.com>
Cc: Susan Machler <Smachler@osbornmachler.com>; Sim Osborn <sosborn@osbornmachler.com>; Jenine Michaelis <jmichaelis@osbornmachler.com>
Subject: RE: Hamilton Litigation - Deposition Dates for Ms. Smith and Ms. Ulmer

We would like to depose these two regardless of your decision, given that they have both been disclosed as defense witnesses. Can you please provide available dates?

Austin Neff | Attorney
Osborn Machler
2025 First Avenue | Suite 1140 | Seattle, WA 98121
206-441-4110 (phone) | 206-441-4220 (fax)
www.osbornmachler.com

Privileged and Confidential Communication. If you are not the addressee, you may not read, copy or distribute this email. If you receive this email in error, please advise us by return email and call (206) 441-4110. Thank you.

OSBORN MACHLER, PLLC 2020
RECOGNIZED BY
Best Lawyers

Osborn Machler was named the Best Lawyers™ "Law Firm of the Year" in Information Plaintiff Personal Injury Law in the United States for the 2020 Edition.

From: Donna Moniz <monizd@JGKMW.com>
Sent: Thursday, May 12, 2022 10:39 AM
To: Austin Neff <ANeff@osbornmachler.com>; Pierce Rand <randp@JGKMW.com>; Jennifer Sproul <sproulj@JGKMW.com>
Cc: Susan Machler <Smachler@osbornmachler.com>; Sim Osborn <sosborn@osbornmachler.com>; Jenine Michaelis <jmichaelis@osbornmachler.com>
Subject: RE: Hamilton Litigation - Deposition Dates for Ms. Smith and Ms. Ulmer

Austin, We are considering withdrawing them per Susan's request and will let you know. Donna

Donna M. Moniz

JGK M&W Johnson Graffe Keay Moniz & Wick LLP
When reputation matters

925 Fourth Avenue, Suite 2300
Seattle, WA 98104
Phone: (206) 223-4770
Fax: (206) 386-7344

From: Austin Neff <ANeff@osbornmachler.com>
Sent: Thursday, May 12, 2022 10:36 AM
To: Donna Moniz <monizd@JGKMW.com>; Pierce Rand <randp@JGKMW.com>; Jennifer Sproul <sproulj@JGKMW.com>
Cc: Susan Machler <Smachler@osbornmachler.com>; Sim Osborn <sosborn@osbornmachler.com>; Jenine Michaelis <jmichaelis@osbornmachler.com>
Subject: RE: Hamilton Litigation - Deposition Dates for Ms. Smith and Ms. Ulmer

Donna and Pierce,

Are you going to provide available dates as requested, or should we contact these witnesses and note their depositions unilaterally?

Austin Neff | Attorney
Osborn Machler
2025 First Avenue | Suite 1140 | Seattle, WA 98121
206-441-4110 (phone) | 206-441-4220 (fax)
www.osbornmachler.com

Privileged and Confidential Communication. If you are not the addressee, you may not read, copy or distribute this email. If you receive this email in error, please advise us by return email and call (206) 441-4110. Thank you.

OSBORN MACHLER, PLLC 2020
RECOGNIZED BY
Best Lawyers

Osborn Machler was named the Best Lawyers™ "Law Firm of the Year" in Information Plaintiff Personal Injury Law in the United States for the 2020 Edition.

From: Austin Neff
Sent: Thursday, May 5, 2022 3:30 PM
To: 'Donna Moniz' <monizd@JGKMW.com>; Pierce Rand <randp@JGKMW.com>; Jennifer Sproul <sproulj@JGKMW.com>
Cc: Susan Machler <Smachler@osbornmachler.com>; Sim Osborn <sosborn@osbornmachler.com>; Jenine Michaelis <jmichaelis@osbornmachler.com>
Subject: Hamilton Litigation - Deposition Dates for Ms. Smith and Ms. Ulmer

Donna,

As you know, plaintiffs will be moving to exclude your designated "rebuttal" witnesses Ms. Smith and Ms. Ulmer and your designated "alternative" expert witness Ms. McNamara. We would like to depose the fact witnesses, Ms. Smith and Ms. Ulmer, as a precaution.

Can you please provide available dates for these depositions?

Austin Neff | Attorney
Osborn Machler
2025 First Avenue | Suite 1140 | Seattle, WA 98121
206-441-4110 (phone) | 206-441-4220 (fax)
www.osbornmachler.com

Privileged and Confidential Communication. If you are not the addressee, you may not read, copy or distribute this email. If you receive this email in error, please advise us by return email and call (206) 441-4110. Thank you.

Osborn Machler was named the Best Lawyers™ "Law Firm of the Year" in Information Plaintiff Personal Injury Law in the United States for the 2020 Edition.

Disclaimer

The information contained in this communication from the sender is confidential. It is intended solely for use by the recipient and others authorized to receive it. If you are not the recipient, you are hereby notified that any disclosure, copying, distribution or taking action in relation of the contents of this information is strictly prohibited and may be unlawful.

Exhibit - V

SUPERIOR COURT OF WASHINGTON, LEWIS COUNTY

SCOTT HAMILTON, as guardian ad litem for Zachary Hamilton, Plaintiff, vs. LAURA HAMILTON and JOHN DOE HAMILTON, individually, and the marital community composed thereof; and LAURA HAMILTON LICENSED MIDWIFE, a Washington sole proprietorship, Defendants.	17-2-00538-21

VIDEOTAPED DEPOSITION UPON ORAL EXAMINATION OF

LAURA HAMILTON

9:33 a.m.

JUNE 27, 2019

114 WEST MAGNOLIA STREET

CENTRALIA, WASHINGTON

REPORTED BY: ELEANOR J. MITCHELL, RPR, CCR 3006

Q. -- it's off to the side of your house, right?
A. Um-hmm.
Q. Okay. Let me -- let me start that over.
Do you have a place in your home where you deliver babies?
A. Yes, I do.
Q. All right. And is -- is the fee the same --
A. Yes.
Q. -- whether you -- you've got to let me get it out.
A. You already asked me what it was.
Q. Okay. It's the same whether or not you -- you deliver at home or whether you deliver at the patient's home, correct?
A. Correct.
Q. All right. All right. When do you discuss fees with your patients?
A. I actually don't discuss the fees with my patients. My officer manager does.
Q. Who is your officer manager?
A. Katie Ulmer.
Q. Can you spell her last name for me, please?
A. U-l-m-e-r.
Q. Okay. Okay. And how often -- is Katie Ulmer a full-time employee?

A. No.

Q. During Seng's pr- -- Seng's -- at any time during Seng's pregnancy, did you have a midwife in training or an assistant?

A. Yes.

Q. Who was that?

A. Shannon Smith.

Q. And where is Shannon Smith now?

A. She is in Yelm.

Q. And is she a midwife now?

A. Yes.

Q. Did she in any way assist in the care of Seng Hamilton?

A. I believe she was at some of the appointments.

Q. Okay. All right. I'm going to go to the day Zachary was born. Okay?

When did you first get a call?

A. That morning that she was in labor.

Q. Okay. Do you remember -- do you remember the phone call?

A. I do.

Q. Tell me the substance of that phone call?

A. She just was reporting that she was having contractions.

Q. Okay. Did you talk to her or did you talk to

Exhibit - W

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, vs. LINDA AMONDSON-MULLER, Personal Representative of the ESTATE of LAURA HAMILTON, Defendants.	NO. 20-2-00543-21

REMOTE VIDEOTAPED DEPOSITION UPON ORAL EXAMINATION OF

ROBERT ALLEN, Ph.D.

April 5, 2022
11:32 a.m.
all parties appearing remotely
New York, New York

TAKEN AT THE INSTANCE OF THE DEFENDANT

REPORTED BY:
AMY J. BROWN, RMR, CRR, WA CCR NO. 2133, ID CCR NO. 700

JOB NUMBER 859959

A. Yes.

Q. All right. Now, your own doctorate is in civil engineering; correct?

A. Yes.

Q. And you're not a medical doctor; right?

A. Correct.

Q. Okay. Let's -- I believe we have a number of exhibits with the videographer. Let's pull up the subpoena duces tecum as Exhibit 1, which may be labeled "SDT." I think it's fourth from the bottom there.

(Exhibit 1 marked for identification.)

BY MS. MONIZ:

Q. And, Dr. Allen, this says "M.D." but you're not in fact an M.D., are you?

A. Correct.

Q. All right. Let's scroll down and get -- look to the next page. So let's stop here.

My first question is, have you provided the information listed to Susan Machler or someone at her office? And we'll start with the first one.

You've given us a current copy of your curriculum vitae; is that right?

A. Yes.

Q. And number 2, it says, "medical reports, photos, correspondence," et cetera.

Q. How reliable do you think it would be for a lay witness to observe birth and determine whether the what looked like pulling was appropriate gentle traction or something else?

A. Well, Ms. Livingston Bleuler is not a lay witness; right? She's a CNA, and she's witnessed about a dozen births beforehand.

Q. So you'd consider her an expert witness on births?

A. No, but she has something to compare to; right? She's seen a dozen births and this one is different.

Q. Ms. Bleuler didn't say there was twisting, did she?

A. She did.

Q. So my question again is: Do you consider Ms. Bleuler, as a CNA having observed a dozen births, to be a reliable witness to distinguish what is appropriate maneuver for a birth and what is not?

A. Well --

MS. MACHLER: Object to the form.

THE WITNESS: "Appropriate" is not -- it's not a word I use with regard to birth because I think it implies a standard of care, which I don't comment on.

BY MS. MONIZ:

Q. Do you think Ms. Bleuler has expertise in what

A. Sure.

Q. In that case, did she testify that she met the standard of care but that the traction did cause the brachial plexus injury?

A. I believe so, yes.

Q. But you don't get involved in testifying about whether any clinician met the standard of care; correct?

A. Correct.

Q. But you do know that if the clinician does not successfully resolve a shoulder dystocia, it can lead to death of the infant; right?

A. Yes.

Q. And it can also lead to brain damage of the infant if the shoulder dystocia is not resolved effectively; right?

A. Correct.

Q. Let's take this down and -- actually, let's not look at any exhibits for the moment. What I'd like you to do, Dr. Allen, is give me an overview of your opinion in this case.

A. An overview of my opinion is that the injury that Zach Hamilton has was caused by Laura Hamilton applying traction during the shoulder dystocia to his head for an excess of that normally used, and that there is no other etiology for the injury. The shoulder

A. It was someplace in her deposition.

Q. Do you have a page number?

A. I don't.

Q. Okay. You indicated that the injury to Zach was caused by Laura Hamilton applying traction during the shoulder dystocia in excess amount.

What -- where do you come up with the inclusion that -- the conclusion that it was excess?

A. I said "in excess of that normally used."

Q. Where do you come up with the conclusion that it was in excess of that normally used?

A. The amount of traction typically used to deliver babies is between 0 and 10 pounds, and the traction, peak traction used here, was on the order of 40 pounds.

Q. And how do you get that calculation?

A. It's not a calculation. It's an estimation based on the severity of the injury.

Q. So you're working backward from the injury and deciding that an injury like this would not occur unless there were 40 pounds of pressure or more --

A. Yes.

Q. -- or force?

A. Correct.

Q. And what is the basis of that conclusion?

Q. Did you --

A. Not in a great one, but she was somewhat in a McRoberts position.

Q. Okay. Can I assume from the depositions of Dr. Stohl, Dr. Sollars, and your wife, Dr. Gurewitsch Allen, that you relied on them to determine standard of care?

A. I have no comment on standard of care.

Q. Did you -- why were you given their depositions?

A. In general, I read depositions of experts.

Q. Why?

A. To learn what sort of thinking they're going through. It's especially important for defense experts, more so than plaintiff's experts.

Q. So did you base your opinion on anything you read in the depositions of the plaintiff's experts whom you've been provided?

A. No.

Q. Did you make any assessment about the natural forces of labor on Zach's shoulder in this case?

A. No.

Q. And as I understand it, the force that you're testifying about is an estimate, not a calculation; correct?

Q. Okay. What else?

A. I can potentially tell you about specific brachial plexus stretching that occurs during the cardinal movements.

Q. What specific brachial plexus stretching does occur during the cardinal movements?

A. I'll have to look at the paper.

Q. Which paper would that be?

A. That's the one that we talked about that I wrote about in 2007.

Q. There were two papers in 2007; right? Is this the one you authored alone?

A. No.

Q. The one you co-authored with your wife?

A. And Lindsay Kranker, uh-huh, among others.

Q. Okay. Let's scroll down to the next page. Okay.

"He will testify regarding the ACOG Neonatal Brachial Plexus publication and other studies regarding the causes of brachial plexus injuries during birth."

Is that what it says?

A. That's what it says.

Q. Is that accurate?

A. I wouldn't have written it that way.

Q. What would you have said?

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

Q. And what would those comments be?

A. You would have to get into the publication.

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

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

Q. And what's the basis of that opinion?

A. It has some statements that suggest these injuries occur spontaneously.

Q. When you say "these injuries," what do you mean?

A. Brachial plexus injuries.

Q. Well, you've told us about one videotaped birth where there were no hands on the fetus at all and there was a temporary brachial plexus injury --

A. Right. I cite that paper. Uh-huh.

Q. Yeah. So these injuries do occur spontaneously; right?

A. A temporary injury can occur spontaneously, yes.

Q. Is it your testimony there's never been reports of permanent injuries occurring without traction?