THE HONORABLE JAMES W. LAWLER

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

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 RESPONSES TO DEFENDANT'S MOTIONS *IN LIMINE*

I. INTRODUCTION

COME NOW plaintiff and submit the following response to Defendants' Motions *In Limine*.

II. ARGUMENT

A. Unopposed Motions.

Plaintiff does not oppose the following Motions *in Limine* filed by defendants:

1	No questioning of witnesses about their religion, relationship with God, communications with God, or anything of the sort.
10	Defendant Hamilton respectfully requests that the Court exclude any argument by plaintiff's counsel requesting the jurors place themselves in the position of the plaintiff.
12	All arguments – direct or indirect – about "sending a message" or otherwise punishing the Defendant must be excluded.
14	Defendant Hamilton respectfully requests that the Parties be required to give 48-hour notice of witnesses to be called at trial.

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18	Plaintiff should only be permitted to offer rebuttal witnesses or evidence that is not repetitive or whose testimony could not have been anticipated in their case in chief.
21	Learned treatises and medical literature are hearsay and Defendant Hamilton respectfully request the Court allow their limited use only after proper authentication.
22	All mention of settlement, settlement discussions, or the absence of settlement discussions is prohibited under ER 408 and should be excluded.
25	Motion to preclude any evidence or argument of any theories of recovery or damages not disclosed in the Pleadings or discovery responses.

B. Opposed Motions.

Plaintiff opposes the following Motions *in Limine* filed by defendants:

2	Dr. Freeman should be excluded because his testimony is misleading and unhelpful to the jury.
3	Motion to exclude Plaintiffs' untimely disclosed fact and expert witnesses, and for terms.
4	Any reference to pain and suffering of the parents or family members and/or any claim for damages for the same must be excluded.
5	Evidence regarding the defendant's history of prior medical malpractice lawsuits and/or Department of Health proceedings must be excluded.
6	Evidence that Defendant Hamilton had other "bad outcomes" or brachial plexus injuries must be excluded.
7	Plaintiffs' counsel should be precluded from asking witnesses questions intended to elicit improper character testimony about Laura Hamilton, such as whether she was a "good" and/or "safe" midwife.
8	Any criticisms of Defendant Hamilton's care that are not linked to Z.H.'s alleged damages by standard of care and causation testimony must be excluded.

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9	Any evidence regarding Seng Hamilton's subsequent gestational diabetes and/or diabetes must be excluded.
11	Plaintiffs should be precluded from substituting "safety" standards with the standard of care.
13	Defendant Hamilton respectfully requests that the Court require a trial schedule.
15	No claim or evidence concerning lost earning capacity of Z.H.
16	Defendant Hamilton respectfully requests that the Court exclude all witnesses from the courtroom prior to their testimony, except for expert witnesses.
17	Defendant Hamilton respectfully requests that expert witnesses be allowed to review trial transcripts prior to their testimony.
19	Testimony by lay witnesses, including Z.H.'s parents, as to what they have been told by treating providers is hearsay and should be excluded.
20	Testimony by lay witnesses, including Z.H.'s parents, about Z.H.'s state of mind, feelings, and pain and suffering is speculative and should be excluded.
23	Any reference to Defendant Hamilton's liability insurance should be excluded.
24	Motion to permit questioning of Seng Hamilton's prior disciplinary history by the Washington State Bar Association for the purposes of impeachment on cross examination.
25	Motion to preclude any evidence or argument of any theories of recovery or damages not disclosed in the Pleadings or discovery responses.
26	Evidence of collateral source benefits is admissible in a medical malpractice action, and under the facts of this case.
27	The parties should be limited to one expert per discipline.
28	The Court should order that the parties confer no later than one week before trial to discuss a possible stipulation to facts.

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

2. Dr. Freeman's Testimony

The plaintiff has indicated many times, including on the record in court, that Dr. Freeman will testify regarding the studies relied upon by defense experts and whether the studies in any way support the opinions of the experts. No, Dr. Freeman will not testify as to standard of care, and he will testify regarding causation to the extent that the studies relied upon by defense experts do not support their opinions on causation. It would be a manifest injustice for defense experts to provide opinions based upon epidemiolocal studies without the plaintiff having the opportunity to show the jury the that the studies do not say what defense experts say they say. In this regard, Dr. Freeman's testimony adds a great deal of value for the jury to consider. That's why the defense is so desperate.

This is the third defense motion to exclude Dr. Freeman. The motion takes somewhat of a shotgun approach, but it seems to encompass four lines of argument. First, the defense claims that the only experts that the plaintiff can call in this case are those who will testify about standard of care and the specific cause of Z.H.'s injury. Second, the defense makes the ridiculous claim that epidemiology is universally inappropriate in medical malpractice cases, even though every defense expert in this case relies on epidemiological studies. Third, the defense argues that plaintiff cannot, as a matter of law, question the bases for the opinions of defense experts. Fourth, the defense childishly attacks Dr. Freeman personally with insults and innuendo.

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First, ER 702 allows the plaintiff to put on expert testimony that will assist the trier of fact to understand the evidence. The matter is simple. The defense has three experts who rely on epidemiological and scientific studies. The experts testified that the studies support their opinions that Z.H.'s four-level avulsion injury was caused by the natural forces of labor. The plaintiff is entitled to examine the studies to determine whether the studies actually provide support for those opinions. An epidemiologist, like Dr. Freeman, has the knowledge, skill, experience, training, and education to assist the jury in understanding the studies and what they mean with respect to the opinions of the defense experts.

The statute requires the plaintiff to prove all the elements of his case, and his medical experts will do that. However, there is no rule or case law anywhere that requires every expert in medical malpractice case testify regarding every element of a plaintiff's case. There is no rule anywhere that plaintiff cannot examine the credibility of defense experts' claims. There is no rule anywhere that plaintiff cannot retain an epidemiologist to analyze the medical literature relied upon by defense experts in forming their opinions.

Second, the defense claims that epidemiology is inappropriate in medical malpractice cases. The plaintiff seriously doubts that the defendant is prepared to live by these words. The entire defense that the natural forces of labor caused this injury is based upon epidemiological studies. It has to be, because Dr. Freeman was correct when he said:

> "You have evidence of what? I mean, that's such a nonspecific question. There's no evidence as to where this child's injury occurred. There's no evidence that that this baby's shoulder got stuck on the sacral promontory. It's a theory, and it's fine. Put that theory out. There's also a theory that manipulating a child's head and shoulder to try to release the posterior dystocia also caused the injury. Those are both explanations given by clinicians."
>
> **Neff Decl. Ex. 2,** Freeman Dep., p. 91, lines 7 – 21.

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No one saw the posterior shoulder get stuck on the sacral promontory. In fact, no one has ever watched any baby's shoulder get stuck on the sacral promontory. This theory of brachial plexus injuries comes solely from computer modeling, performed by a defense expert, not from observation of witnesses. Dr. Grimm testified that:

> Q. And you described how the posterior shoulder gets impacted. . . . And what I'm trying to understand is: How is this mechanism understood? Because it can't be seen, can it?
>
> A. No. It's actually understood based on modeling research . . .

Neff Decl. Ex 1, Grimm Dep., p. 40, lines 17 – 23.

In this case, what everyone saw is that Laura Hamilton turned the baby's head when she used traction first to respond to the shoulder dystocia.

Because no one saw or could possibly see what went on inside Z.H.'s mother's body, the entire natural forces of labor defense depends upon epidemiologic and other scientific studies. Dr. Freeman testified:

> 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.

Neff Decl. Ex 2, Freeman Dep., p. 132, lines 4 – 17.

Nearly every paper relied upon by defense experts involves the study of a population. For example, Dr. DeMott relies upon his own Green Bay cesarean study which studied thousands of births in the Green Bay area over ten years. The study looked a population and is an epidemiological study. He also relies on a study by Chauhan, which studied over 89,000

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births over 23 years at the University of Mississippi. The study looked at a population and is an epidemiological study.

If the defense intends to base its causation theory on epidemiological studies, the plaintiff must be allowed to examine the studies and whether the studies support the opinions of defense experts. In other words, do the studies say what defense experts say they say? Certainly, Dr. Freeman's testimony will be helpful to the jury, because the "jurors generally do not possess sufficient knowledge and training" to interpret an epidemiological study, as the defense has pointed out.

Third, the defense claims that the plaintiff cannot question the bases for defense experts' opinions. This is one of the fundamental pillars of expert witness cross-examination. There is no rule or law anywhere that prohibits a party from questioning the bases for an expert opinion. Under that scenario, experts can say anything.

In this case, Dr. Freeman's analysis shows the defense theory of causation for what it really is – merely a theory. It has never been proven that the natural forces of labor have caused even one four-level avulsion injury. The studies do not prove that it is even possible, and the jury should know that.

The defense claims that both theories of causation are theoretically valid, but if all the defense has to offer is a theory and no science, it is asking the jury to speculate that this theoretical cause that has never been proven was the cause of Z.H.'s injuries. What has been proven by the literature is that traction increases the risk of this rare injury that happens, at most, in 1 of every 10,000 births in the general population but happened 1 in every 225 births under Laura Hamilton's care during the relevant time-period. The jury should know that.

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The jury should hear what the studies actually say, and what inferences can actually be drawn from the studies. Otherwise, defense experts can make up anything they want and point to a study.

Finally, the defense attacks Dr. Freeman. This argument by the defense is not only mischaracterizes Dr. Freeman's testimony, but it is offensive. Name calling and innuendo are not persuasive and frankly childish. If the defense wants to cross-examine Dr. Freeman on his education, experience, and income, they can. These remarks by the defense only demonstrate how desperate the defense is to keep Dr. Freeman's testimony away from the jury.

The Court should deny the third defense motion to exclude Dr. Freeman.

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

As parties prepare for trial, new facts are discovered, new theories develop, and new witnesses are identified. In *Burnet v. Spokane Ambulance*, the Washington supreme court recognized that this is a natural part of the trial preparation process, not something punishable or sanctionable. [1] The *Burnet* court held that imposition of the most severe discovery sanction of witness exclusion is warranted only upon a conjunctive showing that (1) the discovery violation was willful or deliberate, (2) the violation substantially prejudiced the opponent's ability to prepare for trial, and (3) the court explicitly considered less severe sanctions. The court may impose the most severe sanction of witness exclusion only if no lesser sanction would suffice. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299,

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[1] *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997).

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355-56, 858 P.2d 1054 (1993). The presumption is that absent proof of each of the *Burnet* factors, the testimony will be admitted. *Jones*, 173 Wn.2d at 343.

Defendant Hamilton has withdrawn the "act of God" affirmative defense and plaintiff has withdrawn Dr. O'Mahony as a witness in response pursuant to stipulation. Defendant's motion to exclude this witness is now moot. Defendant Hamilton cannot satisfy the *Burnet* factors with respect to any of the fact witnesses disclosed by plaintiff on May 17, 2022, over a month before the start of trial.

Any alleged discovery violation as to disclosure of the remaining witnesses was not willful. Defendant Hamilton disclosed Shannon Smith (midwife Hamilton's assistant) and Katie Ulmer (midwife Hamilton's bookkeeper) as defense witnesses on April 28, 2022 but refused to make them available for deposition. On May 13, 2022, defense counsel emailed plaintiff's counsel and informed them that the defense was withdrawing Ms. Smith and Ms. Ulmer as defense witnesses. After realizing these witnesses may have relevant factual knowledge, plaintiff disclosed them as witnesses on May 17, 2022. Defendant Hamilton is now moving to exclude these witnesses. **Neff Decl. ₱ 2.**

The deposition of Linda Amondson-Muller, the personal representative for Laura Hamilton's estate, took place on the morning of May 2, 2022. During that deposition, Ms. Amondson-Muller testified as follows:

> Q. (By Mr. Neff) Will you be testifying at trial in this case?
> [...]
>
> A. Yes. Yes.
> [...]
>
> Q. (By Mr. Neff) Do you know what you you'll be testifying about at trial?
> A. I think I will be testifying about my friendship with Laura and who she was as a person, as a midwife.
> [...]

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Q. (By Mr. Neff) Do you plan to testify that Laura Hamilton was a good midwife at trial?
A. Yes, I believe so.
[...]

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 [Z.H.]?
[...]

A. I have never seen anything to the contrary of that.
Q. (By Mr. Neff) Do you plan to testify that Laura Hamilton successfully delivered babies in the past before becoming involved with Seng and [Z.H.]?
[...]

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

Neff Decl. Ex 17, Amondson-Muller Dep., p. 21, line 22 -- p. 10; p. 34, line 11 – p. 36, line 20.

After this deposition it became clear to plaintiff that evidence of Laura Hamilton's character for skillful and safe midwifery was likely to be injected into the trial by the defense, whether intentionally or unintentionally. Plaintiff's counsel received a phone call from Angela Lamb on May 2, 2022, regarding an unrelated matter. This case came up in discussion while speaking with Ms. Lamb. Ms. Lamb informed plaintiff's counsel that she was familiar with Laura Hamilton's reputation in the Centralia medical community through her work as a nurse and knew of several patients who were transferred to Providence Centralia Hospital after issues arising under the care of Laura Hamilton. Plaintiff's counsel then discussed the idea of disclosing Ms. Lamb as a rebuttal witness on the issue of Laura Hamilton's character for skillful and safe midwifery. Plaintiff's counsel was unable to reconnect with Ms. Lamb to confirm her willingness to testify until May 17, 2022. Plaintiff's counsel immediately disclosed Ms. Lamb as a witness and offered to make her available for deposition. The defense declined to depose Ms. Lamb and instead indicated they would move to exclude her. **Neff Decl. ¶ 3.**

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The timing of these disclosures was not willful, but rather a natural development that occurred during the trial preparation process. As the elements of the *Burnet* test are conjunctive, the Court should deny Defendant Hamilton's motion for this reason alone.

Defendant Hamilton also faces no prejudice due to plaintiff's disclosure. Generally, disclosures occurring on the eve of trial or during trial are more likely to be found to be prejudicial. See *Jones*, 173 Wn.2d at 344-46; *Burnet*, 131 Wn.2d at 496. In *Jones*, the court found the late disclosures of three witnesses were prejudicial where the relevant witnesses were disclosed three days into trial, at least one week into trial, and three weeks into trial. *Jones*, 173 Wn.2d at 330, 333, 344, 346, 352-53. The court found that these late disclosures left the plaintiffs with no ability to properly prepare for or respond to this testimony and that it constituted an "ambush." *Id.* at 395. Ms. Smith and Ms. Lamb were originally disclosed as defense witnesses and are under the control of the defendant. Defendant Hamilton was free to depose them but chose not to. Defense counsel can also simply call them on the phone to discuss their knowledge of the facts. Ms. Lamb was disclosed over a month before trial and plaintiff immediately offered to make her available for deposition. Defendant Hamilton declined to depose Ms. Lamb.

The rationale behind the *Burnet* court's holding was that the parties should be able to call witnesses and present their best case at trial unless the late disclosure was willful or creates substantial prejudice to the adverse party. Defendant Hamilton may not like or agree with the Washington Supreme Court's holding in *Burnet*, or the underlying policy rationale, but this is the law in Washington State.

The Court should deny this motion.

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

The pain, suffering, and personal hardship of Z.H.'s family members is admissible as res gestae evidence. Res gestae evidence is that necessary to complete the story for jury. *State v. Powell*, 126 Wash. 2d 244, 247, 893 P.2d 615, 618 (1995). Res gestae evidence falls within the ER 401 definition of relevant evidence that is generally admissible under ER 402. *State v. Grier*, 168 Wash. App. 635, 646, 278 P.3d 225, 230 (2012). The res gestae rule applies in civil as well as criminal cases. *Norton v. Payne*, 154 Wash. 241, 242, 281 P. 991, 991 (1929).

If Z.H.'s family members are precluded from testifying as to any pain, suffering, and personal hardship stemming from Z.H.'s injury, this will leave the jury with an incomplete story of this case. Such preclusion will leave the jury wondering why Z.H.'s parents and family members do not seem to care about him or his injury and will invite the jury to feel the same way. This will be immensely prejudicial to plaintiff's case.

The Court should allow limited testimony regarding the experiences of Z.H.'s family members to provide the jury with a complete picture of the case, which included the experiences of Z.H.'s family members.

The Court should deny this motion.

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

Defendant Hamilton's "natural forces of labor" defense – an alternative theory of causation – has opened the door to evidence of prior permanent brachial plexus avulsion injuries occurring under her care. Plaintiffs have filed separate briefing on this issue. The Washington State Department of Health has received approximately 40 complaints against Laura Hamilton pertaining to poor patient care. **Neff Decl. Ex. 11.** Burgess Dep., p. 40, lines 7 – 11. These complaints resulted in numerous State investigations into defendant Hamilton's midwifery practice. The Department of Health first took action against Laura Hamilton's

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midwifery license in 1994. **Neff Decl. Ex. 3,** Hamilton Dep., p. 170, line 3 – p. 172, line 6. The most recent investigation concluded in 2018 and resulted in suspension of defendant Hamilton's midwifery license. The Department of Health concluded that defendant Hamilton's midwifery practice presented "an immediate threat to the public health and safety." **Neff Decl. Ex. 4,** Washington State Department of Health Order., p. 6.

Defendant Hamilton requested a show cause hearing and successfully argued that less restrictive alternatives, as opposed to complete suspension, would adequately protect the public from the danger she presented. Defendant Hamilton's midwifery license was reinstated subject to several conditions designed to ensure patient safety. **Neff Decl. Ex. 4,** Washington State Department of Health Order, p. 7.

Importantly, the Department of Health still concluded that defendant Hamilton's midwifery practiced evidenced an immediate danger to public health and safety. Specifically, the Department of Health found that defendant Hamilton violated her own policies regarding both general patient transfer and emergency patient transfer and transportation, areas of care that are at issue in the present case. **Neff Decl. Ex. 4,** Washington State Department of Health Order, p. 7.

Defendant Hamilton's most recent Department of Health investigation and midwifery licensure suspension, as well as the complaints that led to this outcome, are conditionally relevant once the door is opened through introduction of character evidence by the defense. Under the open-door doctrine, when one party injects evidence into a trial, the opposing party may offer evidence that might otherwise be inadmissible to rebut any unfair inferences that arise from the original evidence. *State v. Gefeller,* 76 Wn.2d 449, 455, 458 P.2d 17 (1969). The doctrine is aimed at fairness and truth seeking. *Ang v. Martin*, 118 Wn. App. 553, 562, 76 P.3d 787 (2003), aff'd, 154 Wn.2d 477, 114 P.3d 637 (2005). Ordinarily, when courts speak of a defendant putting their character at issue, it is assumed they do so by introducing witnesses

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who testify to their good character in terms or reputation or opinion. *State v. Brush*, 32 Wash. App. 445, 450, 648 P.2d 897, 900 (1982). However, by relating a personal history supportive of good character, the defendant opens to door to rebuttal evidence along the same line. *Id;* *State v. Fisher*, 130 Wash. App. 1, 17, 108 P.3d 1262, 1270 (2005) *See also* E. Cleary, *McCormick on Evidence* § 191 (2d ed. Supp. 1978). The determination that a party has opened the door is reviewed for abuse of discretion. *State v. Bennett*, 42 Wn. App. 125, 127, 708 P.2d 1232 (1985).

Defendant Hamilton submitted 41 of midwife Hamilton's continuing education certificates and 32 certificates of professional membership to both state and national midwifery organizations dating back to the mid-1990s in her ER 904 disclosure. The continuing education certificates submitted into evidence by defendant Hamilton include a certificate of attendance for a "Shoulder Dystocia/Gaskin" class from 1995, a "Second Stage (of labor) Difficulties" class from 1995, a "Labor and Birth Complications" class from 1995, a "Certified Fetal Assessment & Limited Obstetric Ultrasound" certificate from 1996, a "Certified Fetal Assessment & Limited Obstetric Ultrasound" certificate from 1996, a "Fetal Assessment & Limited OB Ultrasound" certificate from 1996, an "Advanced Fetal Monitoring" certificate from 1997, a "Gestational Diabetes Management in Pregnancy" certificate from 2013, and a "Certificate of Compliance Mastery – 2014 OSHA – General Safety Training." **Neff Decl. Ex. 5.**

The certificates of membership submitted into evidence by defendant Hamilton include nine certificates from the Midwives Association of Washington certificate stating Laura Hamilton was "a professional member in good standing" during the years 1995, 1996, 1997, 1999, 2000, 2001, 2010, 2011, and 2012, and nine certificates from the Professional Midwives Affiliation stating Laura Hamilton was "a professional member in good standing" during the

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years 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2013, 2016, and 2017. **Neff Decl. Ex. 6.**

The defense has blatantly injected evidence of midwife Hamilton's character for skillful and safe midwifery into this trial. Allowing the defense to put this evidence before the jury while barring introduction of prior complaints and disciplinary proceedings will leave the jury with a grossly inaccurate and unfair perception of midwife Hamilton's character for skill and safety. The open-door doctrine was adopted by Washington courts for this very reason. Once the defense puts midwife Hamilton's character at issue through introduction of this twenty-two-year personal history supportive of character for midwifery skill and safety, plaintiff is entitled to rebuttal.

In addition to the Department of Health's 1994 and 2018 actions against midwife Hamilton's license and the supporting facts, this evidence also opens the door to reputation testimony as to midwife Hamilton's character for midwifery skill and safety from Angela Lamb, a registered nurse at Providence Centralia Hospital who has been transferred care of Laura Hamilton's patients and is familiar with her reputation in the Centralia medical community. ER 405(a).

ER 405(a) also permits "cross examination" into "relevant specific instances of conduct." The Court should also permit plaintiff to cross examine any defense witnesses through whom this evidence is introduced on specific instances of Laura Hamilton's conduct probative of her character for skillful and safe midwifery, including the conduct related to injuries suffered by Levi Myhre under her care. ER 405(a). This evidence is now highly probative due to the tactical decision by the defense to put forth evidence of midwife Hamilton's character for midwifery skill and safety. This decision by the defense makes the above-mentioned rebuttal evidence highly probative and tips the ER 403 balancing test in favor of admission. The Court should not allow the defense to mislead the jury through presentation

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of half-truths. This is the purpose of the open-door doctrine and the reason why it has survived for generations since its inception at common law.

The Court should deny this motion.

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

Plaintiffs have filed separate briefing to admit evidence of Levi Myhre's permanent brachial plexus avulsion injuries in rebuttal to defendant Hamilton's "natural forces of labor" defense – an alternative theory of causation. As outlined in the response to defendant Hamilton's motion in limine No. 5, rebuttal evidence probative of Laura Hamilton's character for skillful and safe midwifery, including poor outcomes and injuries suffered under her care, is also admissible due to the defense decision to inject this character evidence into the trial.

While is it true that a bad medical outcome, alone, does not necessarily equate to medical negligence, bad medical outcomes are probative of provider skill and safety if there is evidence "from which negligence can at least be inferred." *Watson v. Hockett*, 107 Wash. 2d 158, 159, 727 P.2d 669, 670 (1986). The Washington Department of Health found not only that negligence could be inferred, but that it was shown on a more probable than not basis, that Laura Hamilton's care of the three patients at issue evidenced "an immediate danger to the public's health and safety." In the Levi Myhre case, this Court recognized there was ample evidence for a jury to both infer and conclude Laura Hamilton was negligent. The jury did not ultimately reach that conclusion, but the case survived summary judgment and proceeded to trial.

Plaintiff agrees he should not be able to point to isolated poor outcomes, alone, as evidence probative of defendant Hamilton's character for skillful and safe midwifery. However, with respect to the cases forming the basis for the Department of Health's most

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recent suspension of defendant Hamilton's midwifery license and the injuries suffered by Levi Myhre, facts exist to support a conclusion that defendant Hamilton did not act skillfully or safely. This evidence is admissible to rebut character evidence that defendant Hamilton was skillful or safe midwife.

Evidence of Levi Myhre's permanent brachial plexus avulsion injuries is also admissible to impeach the opinion testimony of defense expert Dr. DeMott on the issue of causation. During deposition, Dr. DeMott testified as follows:

> Q. (By Ms. Machler) Okay. And your – your statement that she (midwife Hamilton) used only gentle pressure, what in the – what are you basing that on?
>
> A. Well, just her description that – that's how she delivers babies. And that's how we are all taught to deliver babies. And she has many years of experience doing this, has delivered thousands of babies without deficits, so why, in this particular case, would she do anything different.
>
> Q. (By Ms. Machler) . . . Is there anything in the record that you're relying on that, on this occasion, (Z.H.'s delivery) Laura Hamilton used only gentle traction?
>
> A. No, nothing – nothing specific other than what she normally does.

Neff Decl. Ex. 7, DeMott Dep., p. 31, line 25 – p. 32, line 8.

Dr. DeMott's opinion that defendant Hamilton met the standard of care while delivering Z.H. is based entirely on character evidence suggesting Laura Hamilton was a skilled and safe midwife, including her delivery of "thousands of babies without deficits" during her "many years of experience" as a midwife. Dr. DeMott also testified his opinion in this case is based on a belief that Laura Hamilton "normally" uses gentle traction. As the rules of evidence and the case law make clear, once a defendant offers character evidence to show conformity in the form of reputation or opinion testimony, the plaintiff is entitled to rebut the same using testimony about the defendant's reputation or by cross examining the defense witness about specific instances of the defendant's conduct. ER 404(a); ER 405(a).

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Dr. DeMott's statement is false, and he knew that at the time of his deposition. An expert should not be allowed to tell falsehoods to the jury. Dr. DeMott also cannot change his opinion in order to cover up the prior brachial plexus injury.

Dr. DeMott is defendant Hamilton's standard of care expert. His opinions are central to defendant Hamilton's defense. As such, evidence rebutting his opinions or impeaching the basis therefore is highly probative. Defendant Hamilton has opened the door to this evidence and tipped the ER 403 balancing test in favor of admission.

The Court should deny this motion.

7. "Good" and/or "safe" midwife testimony.

The plaintiffs have already moved to exclude Ms. Amondson-Miller's testimony. Even after taking her deposition, it is still unclear to the plaintiffs what her testimony will be. Nothing she testified to at her deposition is admissible. Her entire deposition is attached to plaintiff's motions in limine.

If the Court does not exclude Ms. Amondson-Miller entirely, plaintiff has no intention to characterize Laura Hamilton as a good or safe midwife.

8. Criticisms of Laura Hamilton's care.

The plaintiff does not fully understand what the defense is asking in this motion. If the defense is asking that plaintiff's experts only criticize Laura Hamilton's treatment of Seng Hamilton if that treatment fell below the standard of care, the plaintiff has no objection unless the order prevents the expert from giving his or her full opinion. The plaintiff also agrees that his experts will testify only about breaches of the standard of care that proximately caused Z.H.'s injuries.

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The law requires that the plaintiff prove all the essential elements of his case. In Washington, expert testimony is required in claims against a health care provider. However, there is no rule, statute, or court ruling anywhere that requires every expert witness to testify to every element. If the defense is asking for such an order, the motion should be denied.

Not every expert, defense experts included, are qualified to testify regarding standard of care, causation, and damages. The plaintiff has brought a motion in limine to preclude the defense nonmedical witnesses from testifying that the natural forces of labor caused Z.H.'s injuries. The law is well settled on that point. The midwifery experts can testify regarding standard of care and the engineering experts can testify about the natural forces labor. However, neither can testify about the specific causation in this case.

The Court should deny the motion.

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

Defendant's argument goes to the weight of the evidence, not its admissibility. Experts for both parties agree that gestational diabetes is a risk factor for shoulder dystocia. **Neff Decl. Ex. 11**, Burgess Dep, p. 71, lines 14 – 16; **Ex. 8**, Sollers Dep, p. 59, lines 17 – 24. Plaintiff's experts agree that Laura Hamilton breached the standard of care by failing to properly test Seng Hamilton for gestational diabetes during prenatal care. **Neff Decl. Ex. 10,** Wilkinson Dep, p. 32, line 17 – p. 33, line 18; **Ex. 8**, Sollers Dep, p. 52, line 23 – p. 53, line 18. As such, there is no way to definitively conclude whether Ms. Hamilton had gestational diabetes while pregnant with Z.H. due to the fact proper testing was not done.

It is undisputed that Ms. Hamilton developed gestational diabetes during a subsequent pregnancy. It is also undisputed that Ms. Hamilton developed type II diabetes after delivering Z.H. It remains disputed whether Ms. Hamilton developed gestational diabetes while pregnant with Z.H.

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Ms. Hamilton's subsequent development of both gestational diabetes and type II diabetes is relevant as it is probative of whether she had gestational diabetes while pregnant with Z.H. Plaintiff's midwifery expert Sandra Wilkinson testified as follows during deposition:

> Q. (By Ms. Moniz) 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.
>
> [...]
>
> Q. (By Ms. Moniz) 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.

Neff Decl. Ex. 10, Wilkinson Dep, p. 33, line 19 – p. 34, line 14.

Relevance is the lowest evidentiary threshold in the courtroom. Relevant evidence means evidence having ***any*** tendency to prove a material fact. ER 401. This evidence is clearly relevant due to the fact that women who develop gestational diabetes or type II diabetes (like Ms. Hamilton) are more likely to have had gestational diabetes in the past, whether diagnosed or undiagnosed. Thus, Ms. Hamilton's development of gestational and type II diabetes after pregnancy makes it more likely she also developed the condition while pregnant with Z.H.

This testimony is in no way speculative. Midwife Wilkinson has more than a "concern" regarding Ms. Hamilton's gestational diabetes. She testified under oath that it is more probable than not that Ms. Hamilton had gestational diabetes while pregnant with Z.H. This testimony is based on Ms. Hamilton's subsequent development of both gestational and type II diabetes, her family history of diabetes, her ethnicity, the size of Z.H. compared to her other babies, the inadequate testing performed by defendant Hamilton.

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Defendant Hamilton also cites the wrong standard for admission of this testimony and fails to identify any unfair prejudice. Ms. Wilkinson did not testify that Ms. Hamilton's subsequent diabetes is the cause of Z.H.'s injury. Rather, she testified that Ms. Hamilton's subsequent diabetes supported her opinion that the condition was present and undiagnosed during Ms. Hamilton's pregnancy with Z.H.

Evidence is not considered in a vacuum. It must be considered in its totality. Taken to its logical conclusion, defendant's argument suggests any evidence supporting an expert opinion is irrelevant if it does not provide the sole support for the opinion. This is non-sensical. To present midwife Wilkinson's opinion to the jury, plaintiff must also present the basis for the opinion, part of which is Ms. Hamilton's subsequent development of gestational and type II diabetes. The fact that defendant disagrees with Ms. Wilkinson's opinion does not make the evidence supporting it unfairly prejudicial.

The Court should deny this motion

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

Defendant Hamilton seeks to anticipatorily prevent plaintiff from employing the "reptile," a trial strategy defendant contends is so powerful and manipulative that jurors are emotionally compelled to return a verdict for the plaintiff regardless of the evidence or the law. The defense claims that jurors are so fragile that testimony about patient safety will paralyze the jurors with fear, compelling them to "(protect) their community" and "(send) a message." Given that midwife Hamilton unfortunately passed away over a year ago, it is unclear whom the jury would be sending a message to or protecting their community from.

Defendant Hamilton's motion is a stock, and now somewhat dated, defense motion that is an effort to micromanage the words plaintiffs and their witnesses may use at trial and effectively eliminate use of the words "safe" or "safety" in court. Instead, defendant Hamilton claims that any criticism of the actions and non-actions of defendant Hamilton must use

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"standard of care" language. This argument has been previously advanced by a medical negligence defendant and rejected by Washington courts. In *White v. Kent Medical Center Inc. PS,* [1] the court held, "there is no legal basis for the defendants' assertion that in order to be admissible, an expert's testimony must be in "standard of care" language. The *White* court concluded that "[t]o require experts to testify in a particular format would elevate form over substance." *Id.* The Court should deny this motion for the same reasons it should deny any other attempts to micromanage language and argument at trial.

Defendant Hamilton's motion is also not a proper subject for a motion in limine as it fails to cite any specific evidence to exclude. A motion in limine is "a pretrial request that *certain* inadmissible evidence not be referred to or offered at trial."[2] Motions in limine must "describe the evidence which is sought to be excluded with sufficient specificity to enable the trial court to determine that it is clearly inadmissible."[3]

The defense request is overly broad, ambiguous, and fails to demonstrate that specific evidence is inadmissible. This motion is not an objection to evidence, but rather to an ill-defined trial strategy defendant alleges plaintiff intends to employ. These boilerplate "reptile" motions, popular with defense counsel in the last decade, are improper because it is impossible to discern what exactly the defendant is seeking to exclude. These motions are premature and are better left to contemporaneous objections during trial. The Court should deny this motion for these reasons alone.

There is a dearth of Washington case law addressing this issue. However, federal courts have spoken regarding defense requests of this nature. As the court in *Aidini v. Costco Wholesale Corp.*, No. 2:15-cv-00505-APG-GWF, 2017 U.S. Dist. Lexis 55863 (D. Nev. Apr.

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[1] *White v. Kent Medical Center Inc. PS,* 61 Wn. App. 163, 172 (1991).
[2] Black's Law Dictionary (10th ed. 2014) (emphasis added).
[3] *Douglas v. Freeman*, 117 Wash. 2d 242, 255, 814 P.2d 1160, 1167 (1991).

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12, 2017) noted, "[the defendant]'s arguments about the reptilian theory fail. Federal courts have hissed at motions based on this theory that seek a broad prospective order untethered to any specific statement the other side will make." A court order prohibiting any "strategy," reptile or otherwise would be impossibly vague and pose significant problems during trial, including:

(1) It assumes that plaintiff and their witnesses all know the alleged "strategy" and can studiously avoid using the wrong words. Unintentional slips could result in Court sanctions or even potentially a mistrial;

(2) A broad prohibition by the Court which is not specific as to particular items it encompasses could exclude proper evidence or argument, and thereby be an abuse of discretion;

(3) Such an order would require frequent conferences before questions to witnesses, offers of evidence, or argument by plaintiff's counsel to determine if the order prohibits it.

(4) To those things arguably prohibited, constant offers of proof will be necessary to make a record of the evidence, testimony, or argument so prohibited, slowing the trial to a crawl.

Moreover, the standard of care fundamentally exists to promote patient safety and prevent injury, as confirmed by the testimony of defense experts. Defendant Hamilton's standard of care expert Dr. DeMott testified as follows during his deposition:

Q. (By Ms. Machler) And that's – that's the whole point of – of the standard is to prevent injury; is that correct?

A. Well, yes, and to save the life of the baby. I guess that would be saving – that would be decreasing hypoxic injury, yes.

Neff Decl. Ex. 7, DeMott Dep., p. 40, lines 9 – 15.

Defense midwifery expert Mary Burgess testified as follows during her deposition:

Q. (By Mr. Neff) 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.

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Q. (By Mr. Neff) 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.

Neff Decl. Ex. 11, Wilkinson Dep, p. 31, line 25 through p. 32 line 6.

The second defense midwifery expert Dolly Browder testified as follows during her deposition:

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. (By Mr. Neff) Why is it important for a midwife to do that?

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

Neff Decl. Ex. 12, Browder Dep, p. 92, lines 15 – 22.

Granting of this motion would cripple plaintiff's ability to cross examine these witnesses. It would also divorce the applicable standard of care from its purpose of patient safety and unfairly bolster the defense argument that Z.H.'s injury was an incredibly rare but natural occurrence not caused by any breach of defendant Hamilton's duty as a birth attendant.

The Court should deny this motion.

15. Lost earning capacity.

Plaintiff's expert life care planner did not include lost earning capacity. Instead, she included the cost of a four-year college education in Washington, which she will testify is now necessary for Z.H. rather than a trade or other employment due to his disability. That portion of her testimony is included in the defense motion at page 35. She should be allowed to testify regarding her decision to include college education rather than lost earning capacity.

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Further, Z.H. has a visible disability, and the plaintiff should be allowed to present evidence through the life care planner and the neurologist that a disability presents obstacles in obtaining and keeping employment. This will part of Z.H.'s general damages claim.

RCW 4.56.250 provides: "'Noneconomic damages' means subjective, nonmonetary losses, including, but not limited to pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation, and destruction of the parent-child relationship."

The plaintiff should be allowed to present evidence and argue that Z.H.'s disability and disfigurement will probably affect his ability to obtain and keep employment. He will suffer discrimination and humiliation all his life, including in his employment.

The Court should deny this motion.

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

Scott Hamilton is a party to this case and may not be excluded from the courtroom pursuant to ER 615(1). As Z.H.'s mother who received the care in question from the defendant and was often unaccompanied to prenatal appointments, Seng Hamilton's presence in the courtroom is clearly necessary to the presentation of plaintiff's case pursuant to ER 615(3).

Plaintiff has no objection to excluding other witnesses from the courtroom but would request the exclusion apply to all non-party witnesses, including experts.

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

The Court should exclude both parties' experts from the courtroom and prohibit them from reviewing trial transcripts. During discovery in this case, defendant Hamilton consistently

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took the position that a plaintiff's experts are required to be deposed before a defendant's experts. Despite citing no authority to support this position, defendant Hamilton claimed that the reason for this was so that defense experts could review deposition transcripts of plaintiff's experts and "respond." Plaintiffs objected on the grounds that this was an attempt by defendant Hamilton to tailor her expert testimony in response to that of plaintiff's experts. This motion raises similar concerns.

Questions concerning the exclusion of witnesses and the violation of ER 615 are within the broad discretion of the trial court and will not be disturbed, absent manifest abuse of discretion. *State v. Schapiro*, 28 Wn. App. 860, 867-68, 626 P.2d 546 (1981); *State v. K.L.G.*, No. 71466-0-I, 2015 Wash. App. 1073, at *27 (Ct. App. May 26, 2015). This motion is another attempt by the defendant to gain a tactical advantage, like what occurred during discovery. The Court should not permit defense experts to observe the testimony of plaintiff's witnesses and tailor responsive testimony. This affords the defendant an unfair tactical advantage simply due to the order of the presentation of evidence.

This is a relatively straightforward medical negligence case. Cases of this nature typically involve complex surgeries and thousands of pages of medical records. Defendant Hamilton's medical records from the prenatal care of Seng Hamilton and the delivery of Z.H. total 21 pages. **Neff Decl. Ex. 13.** There is no reason that the presence of defense experts during trial is necessary to defendant Hamilton's defense. The fact that plaintiff, the party bearing the burden of proof, does not require the presence of their expert witnesses to present this case should instruct the Court on this issue. The Court should exclude all expert witnesses from the courtroom and prohibit review of trial transcripts to make this trial as fair as possible to both sides.

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The Court should deny this motion.

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

Plaintiff does not oppose this motion as it relates to testimony by lay witnesses regarding statements made to them by physicians. However, statements made to lay witnesses by Laura Hamilton and her agents Shannon Smith (midwifery assistant) and Katie Ulmer (bookkeeper) within the scope of their authority are admissions of a party opponent and categorically non-hearsay. ER 801(d)(2). The death of a party opponent does not affect the admissibility of that party's admissions under Washington law. *In re Estate of Miller*, 134 Wash. App. 885, 888, 143 P.3d 315, 316 (2006); *Hor v. City of Seattle*, 18 Wash. App. 2d 900, 902, 493 P.3d 151, 153 (2021). If the Court is inclined to grant this motion, it should not preclude testimony regarding statements made by Laura Hamilton, Shannon Smith, or Katie Ulmer.

20. Testimony by lay witness regarding Z.H.'s pain and suffering.

The Court should deny the motion. Z.H. cannot testify for himself, and the testimony of friends and family is necessary to inform the jury about the devasting effects this injury have had on this young child. Z.H.'s own statements about his then-existing mental, emotional, or physical condition are admissible hearsay. ER 803.

Further, testimony regarding another person's appearance or demeanor is admissible. *State v. Magers,* 164 Wn. 2d 174, 189 P. 3d. 126 (2008) (officer testified that when he arrived at the crime scene and spoke to the alleged victim, she was "obviously traumatized" and he could tell that "something went terrible wrong.") In the present case, Z.H.'s family should be allowed to testify that Z.H. gets frustrated and sad when he cannot do things other children can do. His parents should be allowed to testify why Z.H. was treated for depression at age five.

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The Court should deny the motion to the extent that it precludes plaintiff's witnesses from describing Z.H.'s disabilities and their devastating effects.

23. Liability insurance.

The plaintiff does not intend to mention liability insurance, unless the Personal Representative is allowed to testify. If the PR testifies about the contents of Laura Hamilton's estate, the jury could infer that the assets of the estate are at stake in this lawsuit. The defense has taken the position that only the liability insurance is available to pay a judgment in this case, and the plaintiff should be allowed to convey to the jury that only the insurance proceeds would be subject to any judgment. The plaintiff will be unfairly prejudiced if the defense is allowed to present testimony regarding Laura Hamilton's estate.

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

The defendant's attempt to paint Seng Hamilton's temporary suspension from legal practice as probative of her truthfulness stinks of desperation. Character evidence is barred from trial by ER 404(b) unless the offering party has a basis for admission other than conformity or the adverse party has opened the door to such evidence. *State v. Vazquez*, 198 Wash. 2d 239, 245, 494 P.3d 424, 430 (2021). Character evidence of a witness ***may*** be admissible on cross examination in the form on specific instances of conduct pursuant to ER 608(b). *State v. McBride*, 192 Wash. App. 859, 861, 370 P.3d 982, 982 (2016) (emphasis added). The character evidence ***must*** be probative of the witness' character for truthfulness or untruthfulness. *State v. Wilson*, 60 Wash. App. 887, 888, 808 P.2d 754, 755 (1991) (emphasis added). Admission of this character evidence is subject to the discretion of the trial court. *State v. O'Connor*, 155 Wn.2d 335, 349, 119 P.3d 806 (2005). The court should apply the overriding

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protection of ER 403 to ensure the evidence is not unfairly prejudicial and does not confuse or mislead the jury. *State v. Perez-Valdez*, 172 Wash. 2d 808, 815, 265 P.3d 853, 856 (2011).

The Washington State Bar Association did not make any finding of dishonesty or intent in relation to Seng Hamilton' temporary suspension from the practice of law. The Bar Association found that Ms. Hamilton over drafted her trust account, did not maintain proper trust account records, negligently disbursed settlement funds, and negligently split fees with a non-lawyer. **Rand Decl. Ex S**. At worst, this is evidence of prior negligence or carelessness on the part of Ms. Hamilton. Ms. Hamilton was subsequently reinstated by the Bar Association and now practices full time as a public defender. Her temporary suspension from legal practice for lack of attention to her responsibilities as a lawyer is in no way probative of her character for truthfulness. This is not the sort of evidence contemplated by ER 608(b).

Any conceivable probative value is also substantially outweighed by the danger of unfair prejudice, rendering this evidence inadmissible under ER 403. The vast majority of jurors are not lawyers. They do not understand the intricacies of attorney responsibilities related to client trust accounts. They also do not understand that a disciplinary proceeding against an attorney for violations of the rules of professional conduct does not necessarily mean dishonesty occurred, as was the case here. As such, there is real risk that jurors may believe the defendant Hamilton's misleading arguments on this issue. This will force plaintiff to rehabilitate Ms. Hamilton from a baseless attack on her credibility.

The Court should deny this motion in limine.

25. Motion to preclude any evidence or argument of any theories of recovery or damages not disclosed in the pleadings or discovery responses.

The defense again seeks to preclude evidence and argument without identifying what it is talking about. As in the motion to exclude "reptile" argument, the defense request is overly broad, ambiguous, and fails to demonstrate that specific evidence is inadmissible. And as in the

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"reptile" motion the defense is seeking a broad prospective order untethered to any specific statement the plaintiff might make.

This motion will also force countless sidebars and bench conferences between the parties, interrupting the witness testimony, to determine whether or not evidence was disclosed by either side in discovery. If unanticipated evidence is presented at trial, the correct mechanism is impeachment or possible rebuttal, not an overly broad pretrial order that could prevent the parties from presenting their case.

The plaintiff suspects this motion is another attempt by the defense to learn about plaintiff's trial strategy before trial by forcing the plaintiff to guess what the defense is talking about and responding to it.

The Court should deny the motion.

26. Collateral source benefits.

Nothing in RCW 7.70.080 prevents the plaintiff from presenting the medical bills incurred as a result of Laura Hamilton's negligent care. Washington courts have long held that language cannot be read into a statute that the legislature has omitted. *State ex rel. Thigpen v. City of Kent,* 64 Wn. 2d 823, 394 P.2d 686 (1964).

Plaintiff agrees that the defense can offer evidence of what was actually paid, and the plaintiff can testify that he has an obligation to repay this if there is a plaintiff's verdict. The amount billed by Children's Hospital for Z.H.'s surgeries reflects the extent of his injuries that required three surgeries and annual follow-ups with multiple doctors and therapists. For example, the first surgery to repair the extensive damage to Z.H. lasted over ten hours and cost over $132,000. The second surgery a month later took over six hours and cost over $74,000. The jury can infer that these surgeries were so costly because of the amount of damage. **Neff Decl. Exs. 15 & 16,** Schedule of Damages and records from Seattle Children's Hospital.

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Furthermore, RCW 7.70.080 does not affect the plaintiff's ability to present testimony regarding the cost of future medical care. The statute does not permit the defense to argue that future costs will likely be paid by insurance or Medicaid.

Finally, the Court should preclude the defense from identifying the collateral sources. Much of Z.H.'s medical care was paid by Medicaid. The Court should prohibit the defense from prejudicing the plaintiff by referencing Medicaid. The defense has already attempted to obtain the plaintiff's income tax returns to argue that the Hamiltons could not afford medical care, inviting the jury to conclude that they should not be having a child they cannot afford.

27. One expert per discipline.

The basis for this motion is unclear considering Defendant Hamilton has disclosed three midwifery experts. Plaintiff intends to call Dr. Gurewitsch Allen and Dr. Brian Sollers as his obstetrician experts. Dr. Sollers' testimony that Laura Hamilton's prenatal care fell below the standard of care is distinct from Dr. Gurewitsch Allen's testimony regarding the excessive force used by Laura Hamilton in delivering Z.H. Dr. Gurewitsch.

Dr. Gurewitsch currently has a grant from the Agency for Healthcare Research and Quality to develop and use a "virtual reality-enhanced haptic simulation to improve self-regulation of applied delivery force during shoulder dystocia." She has also published widely on the management of shoulder dystocia.

Dr. Sollers, on the other hand, practices in a small town in the State of Washington and will testify regarding the management of shoulder dystocia, as well as the standard of care in Washington for prenatal evaluation of blood sugar and screening for gestational diabetes. He will use a model to show how a baby moves through the birth canal and what happens with a

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shoulder dystocia. The plaintiff's midwife expert will be testifying from England and does not have access to a model.

The testimony of the two obstetricians is not identical, and the Court should allow plaintiff to present his case to the jury.

With respect to Dr. Freeman, this motion will be the fourth defense motion to exclude Dr. Freeman. As plaintiff's counsel has said on multiple occasions and on the record in court, Dr. Freeman will be testifying about the papers from the medical literature relied upon by defense experts. He will not be offering opinions in biomechanics other than commenting on the papers relied upon by defense experts.

Anticipating yet another motion to exclude Dr. Freeman based on his qualifications, plaintiff's counsel inquired about Dr. Freeman's qualifications in the biomechanics of injury, as well as his qualifications as an epidemiologist. Plaintiff expected a motion to preclude Dr. Freeman from commenting on the articles relied upon by Dr. Grimm because he has no expertise in biomechanics.

The defense carefully edited out plaintiff counsel's stated intentions when asking about Dr. Freeman's qualifications:

> 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 scope of the Court's order. But, of course you may answer.
>
> 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.

Neff Decl. Ex. 2, Freeman Dep., p. 125, line 19 through p. 126, line 3.

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These questions in no way signals an intent to have Dr. Freeman provide biomechanical opinions. In fact, Dr. Freeman testified on several occasions that he would only testify regarding the literature relied upon by the defense experts:

> "That I would talk about the studies that are being used by Dr. Scher, S-c-h-e-r, Dr. DeMott, D-e-M-o-t-t, and Dr. Grimm, G-r-i-m-m." Freeman Dep., p. 32, p. 2-4.
>
> "I'm only going to be talking about the literature, how it supports the opinions of these experts. p. 64, lines 8-10.
>
> "I am going to talk about the fact that the opinions that have been provided by the defense experts and the literature as cited to support those opinions actually don't. They don't gel. They don't come together. There is no support for the inferences made and the opinions made by the defendant's experts." p. 93, lines 19-22.

Neff Decl. Ex. 2, excerpts of the Deposition of Dr. Freeman.

The Court should deny the motion and allow the plaintiff to present his case. The plaintiff is required to prove his case with expert testimony regarding standard of care, causation, and damages. Unfairly limiting plaintiff's experts will certainly prejudice the plaintiff.

28. Stipulated facts.

The Court should deny the motion. The plaintiff has already asked the defense to send over a set of stipulated facts for consideration. The defense has not done so as of the time of this writing. However, the plaintiff remains concerned that stipulating to certain facts will interfere with plaintiff's presentation of his case by precluding testimony regarding the stipulated facts. The plaintiff is entitled to present his case in full.

The plaintiff has no problem putting on his case efficiently, but he should be allowed to present his entire case. Further, the plaintiff worries that the proposed conference will give the

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defense a preview of plaintiff's trial strategy by forcing plaintiff to inform the defense which facts they intend to prove or contest. The plaintiff is not required to disclose his trial strategy.

29. Dr. Robert Allen testimony.

The defense claims that Dr. Allen has testified regarding standard of care when he described normal traction used by the birth attendant during delivery. He is, in fact, going to testify regarding studies that measured the amount of traction used by the physicians participating in the studies he relies upon. These studies are contained in peer-reviewed medical literature.

Q. This -- the first sentence here says, "The severity of Zachary's injuries required force approximately eight to ten times more than normally applied by clinicians." First of all, did you express that opinion to Ms. Machler?

A. I think so.

Q. And what is the basis of that opinion?

A. I think we've been going that this whole deposition.

Q. Well, numbers are not my strong point, but I thought you told us earlier 40 pounds of force and that the usual is 0 to 10.

A. Okay.

Q. So eight to ten times sounds like 80 to 100 pounds?

A. No. No. No. No. No. It would be the average; right? So 0 to 10, then say 5 pounds is typical, so eight to ten is 40 to 50.

Q. But your research with Dr. Gonik did not – did not show average of 5 pounds, did it?

A. No. He was -- he was a little bit -- he was a little higher, but all the other deliveries were -- turned out to be that.

Q. All of what other deliveries?

A. I've done about a hundred so far, and we did 29 in Houston.

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Q. So you're saying of the 100 total that you did at Houston, Delaware, Georgetown and Hopkins, the ·average delivery force in a normal delivery was·5 pounds?

A. Yes.

Q. And where would we find that information ·recorded?

A. It's not.

Q. So can you give me any scientific evidence that·would say that 5 pounds of force is used in a normal·delivery?

A. Yeah.· If you take all the studies that we measured the force in and average them out, it turns out to be about 5 pounds.

Q. Now, in the Gonik study, there were – there was additional force used for difficult deliveries; correct?

A. Yes.· Yes.

Q. And there was even more force used for shoulder dystocia deliveries; right?

A. Yes.

Q. So you wouldn't expect that in a case like·this, which Ms. Hamilton described as a very difficult shoulder dystocia, that she would only use the average·force of normal deliveries; correct?

A. Not correct.· I think one of the things our paper showed was that you don't need large forces to deliver shoulder dystocia babies.· And the whole point·of it was to stop using traction when it doesn't work.

Q. What was the range of force used in these other clinical studies?

A. I don't recall.· It was about 5 pounds.

Q What was the range?

A. The range was 0 to 10.

Neff Decl. Ex. 14, R. Allen Dep., p. 69, line 11 – p. 71, line 21.

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Dr. Allen says nothing about the standard of care. He is forming his opinion based on the studies. Plaintiff's counsel can advise Dr. Allen to specify that he is referring to what force was normally used by the participants in the studies.

Defense counsel asked Dr. Allen if he had any comments about the ACOG bulletin, and he answered the question. Plaintiff's counsel will not ask Dr. Allen what he thinks the purpose of the ACOG bulletin is, but if asked specifically about what it says or whether the studies listed in it support the conclusions of the authors, Dr. Allen should be able to respond.

The Court should deny the motion.

Dated this 26th day of May, 2022.

OSBORN MACHLER

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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
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☐ Via Electronic Filing
☐ Via Legal Messenger
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Dated this 27th day of May, 2022 at Seattle, Washington.

Katie Bue

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