Honorable Judge James W. Lawler
Hearing on June 1, 2022, at 9AM
With Oral Argument

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

SCOTT HAMILTON, as guardian ad litem for Z.H., Plaintiffs, v. LINDA AMONDSON-MULLER, Personal Representative of the ESTATE of LAURA HAMILTON, Defendants.	NO. 20-2-00543-21 DEFENDANT HAMILTON'S RESPONSE TO PLAINTIFFS' MOTIONS *IN LIMINE*

Defendant Hamilton by and through her attorneys or record, respectfully submit the following Responses to Plaintiffs' Motions *in Limine*.

1. The Defense Should be precluded from using the Name Zack.

Defendant Hamilton opposes this motion. It is believed that Zachary goes by the shorthand "Zach." It is appropriate to call him by his customarily used name. Plaintiffs' argument that he has not given the defense "permission" to call him by his customary name is nonsense and unsupported by any authority. It appears that Plaintiffs' counsel wants to call him "Zach" while forcing the defense to call him "Zachary" to create contrast and the appearance that defense counsel is alien and the antagonist. All parties should be permitted to refer to Z.H. by the name he customarily goes by.

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More importantly, Plaintiffs' do not cite to any instance where they objected to defense counsel referring to Z.H. as "Zach" at any time during any deposition. They have waived their right to object now. CR 30(h)(2) Ende, § 45.6 Objections to questions; instructions not to answer, 15A Wash. Prac., Handbook Civil Procedure § 45.6 (2021-2022 ed.). Indeed, granting this motion would create major logistical problems as there are multiple deposition transcripts where Z.H was referred to as "Zach" and those deposition transcripts may be used at trial.

2. Act of God.

This motion should be denied as it has been resolved by the parties' stipulation. Religion is not relevant to this lawsuit. Defense counsel will make no reference to "act of God" in the presence of the jury and the parties have agreed that religion will not be injected in this lawsuit in any way. This is further addressed in Defendant Hamilton's response to a separate motion contained in Plaintiffs' Motion Re: Expert Testimony.

3. Exclude testimony of the Personal Representative.

This motion should be denied. Ms. Amondson-Muller was a friend of Laura Hamilton. She testified during her deposition that she met Laura at LPN school and knew her for 45 years. (*See* Supp. Rand Decl. Ex. 16 at 8:23.) She also has personal knowledge of Laura's clinical practice, testifying that she attended 50 delivers and that, to her knowledge, Laura delivered well beyond 4,000 babies during her career. (*Id.* at 8-15.) All of this is relevant as it lays a foundation for Laura Hamilton's qualifications and credentials.

Laura Hamilton has, unfortunately, passed away, so it is particularly important that the defense be permitted to call a witness to offer such testimony. Laura Hamilton was deposed on June 27, 2019. This was a *discovery* deposition taken by Plaintiffs' counsel and, naturally, they made a concerted effort to avoid questioning Laura on her qualifications and experience, which is substantial. It would be manifestly prejudicial to require the defense to present evidence about Laura Hamilton's qualifications based solely on the limited and

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biased questioning of Plaintiffs' counsel during her *discovery* deposition. Plaintiffs cite no Rule or case law requiring this. Defendant Hamilton is entitled to present this evidence through a live witness.

Plaintiffs' reliance on Ms. Amondson-Muller's deposition transcript is also misleading. This was not a perpetuation deposition. It was a very short discovery deposition taken by Plaintiffs' counsel, lasting barely over an hour. Many of Plaintiffs' counsel's questions either asked Ms. Amondson-Muller's about her relationship with "God," or sought to elicit improper character evidence. Ms. Amondson-Muller answered the questions before her, but there may be other matters relevant to Laura Hamilton's qualifications on which she has personal knowledge that Plaintiffs' counsel simply neglected to fully explore.

Regardless, as demonstrated above, Ms. Amondson-Muller offered testimony regarding Laura Hamilton's qualifications and experience that is relevant to the litigation. ER 401, 402. Moreover, limited testimony about Laura's death is certainly relevant to provide context to the jury for why she is not present. Indeed, clarifying this point is in the best interest of all parties. Laura passed away at the height of the pandemic, but her death was unrelated to COVID. If no explanation is provided, the jury may well speculate about the nature and cause of her death and whether it was COVID-related. The pandemic has been front and center in people's minds for over two years now, and is, itself, a charged issue that should be avoided at trial whenever possible. Providing a brief explanation about the cause of Laura's non-COVID related death would avoid confusion and ensure that the jury's focus is properly on the medical issues and evidence being presented. Plaintiffs' argument that such testimony would be unduly prejudicial under ER 403 is pure pretext. The jury will obviously know that Laura is dead, so it is difficult to understand how a brief statement about the cause of Laura's death from Ms. Amondson-Muller would be so manifestly prejudicial as to require exclusion.

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Plaintiffs' actual motivation for wanting to exclude Ms. Amondson-Muller's testimony is obvious: they want to present their case through emotionally charged testimony from friends and family against the faceless entity of The Estate. They want to exclude any testimony about who Laura Hamilton was as a person or anything that would tend to humanize her. Plaintiffs' counsel's client, Z.H., is an injured child. They know that there is a real possibility in cases like this that, regardless of merit, the jury may award damages based on sympathy alone. The fact that Laura is not alive to defend herself only magnifies that risk. The jury could easily feel some misplaced obligation to "help" Z.H. because they perceive no downside or consequence to Laura Hamilton—after all, she is dead.

Now, Plaintiffs' counsel will probably cry outrage and deny that this is their motive, or that this possibility even exists; but they know it is true. And Plaintiffs' counsel also knows that this would not be an issue had they been diligent in their preparations and not voluntarily dismissed this lawsuit back in July of 2019 when Laura was still alive. It is unfortunate that they are allowed to profit from their own shortcomings.

As made clear in Defendant Hamilton's MIL No. 7, defense counsel has **no intention** of eliciting improper character evidence from Ms. Amondson-Muller. Indeed, Defendant Hamilton filed her own motion to exclude this evidence considering Plaintiffs' counsel's questioning. This concern has no merit.

There is one final point that needs to be addressed: Plaintiffs claim that "the defense has taken the position that the plaintiff is only entitled to insurance coverage." Plaintiffs' counsel has recently made similar ambiguous statements elsewhere. This is concerning because there should be **no issue** on this point. Plaintiffs commenced this lawsuit under RCW 11.40.060, which limits their recovery to liability insurance premiums, only. This is even confirmed in the Order appointing personal representative signed by this Court:

> 2. THAT bond is waived as this is an action seeking liability insurance proceeds (RCW 11.40.060) and there will be no impact on the Estate.

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(*See* Supp. Rand Decl. Ex. 17.)

Plaintiffs have never disclosed any basis on which they could collect damages outside the insurance policy. And the defense is unaware of any motion or filing by Plaintiffs' counsel making such a request or otherwise modifying this Court's prior ruling. If Plaintiffs *do* intend to try and recover damages outside of the liability policy, then that is a major violation of the discovery rules and counsels' duty of candor to this Court, which needs to be addressed immediately.

4. Sidebar remarks.

Agreed, so long as this ruling is applied mutually to both parties.

5. Display and publishing of Exhibits.

Agreed, so long as this ruling is applied mutually to both parties.

6. Objection to discovery and/or discovery disputes.

Agreed so long as this motion is applied mutually to both parties. Defendant Hamilton, however, reserves the right to address Plaintiffs' ongoing discovery violations with the Court outside the presence of the jury should that become necessary.

7. Witnesses and evidence not previously disclosed.

Defendant Hamilton opposes this motion as vague and nonspecific. At this time, Defendant Hamilton does not anticipate new evidence of witnesses being called/introduced. However, if hypothetically, a party decided to call a previously undisclosed witness or introduce previously undisclosed evidence at trial, the Court would be required to perform a *Burnet* analysis, on the record, before exclusion. *Burnet v. Spokane Ambulance*, 131 Wn. 2d 484, 494, 933 P.2d 1036 (1997), as amended on denial of reconsideration (June 5, 1997); *Keck v. Collins*, 184 Wn. 2d 358, 357 P.3d 1080 (2015) (holding that the Court must conduct its *Burnet* analysis on the record before excluding expert testimony). Specifically, to exclude the evidence, the Court would need to find that (1) the party offering the testimony at issue willfully or deliberately violated a discovery order, (2) that the violation substantially

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prejudiced the opposing party, and (3) that a lesser sanction would not suffice. *Burnet*, 131 Wn. 2d at 494. The Court cannot perform this analysis as a theoretical exercise before trial. There must be an actual issue, and the findings must be based on the specific facts and circumstances attendant to that issue.

Again, Defendant Hamilton does not anticipate any problem arising on her end. However, a blanket order *in limine* excluding all late-disclosed evidence would be an abuse of discretion under *Burnet.* The Court should reserve on this motion so that a proper *Burnet* analysis can be performed in the event an issue arises at trial.

8. Consulting experts

Agreed, so long as this ruling applies mutually to both parties, and so long as Plaintiffs' provide 48-hours' notice for the witnesses they will be calling, per the Court's pre-trial ruling.

It should be noted that if Plaintiffs elect not to call an expert in a particular field/discipline, Defendant Hamilton is certainly permitted to comment on the absence of such expert support as this goes directly to the weight of the evidence on Plaintiffs' burden of proof.

9. Filing of motion.

Agreed that the motions *in limine* will not be referenced specifically, so long as this motion applies mutually to both parties. That said, the parties should be allowed to reference MIL in objections to the court as a short hand to alert the court of a potential violation without saying what motion.

10. Absent witnesses/failure to call witnesses

Defendant Hamilton opposes this motion as vague insofar as it fails to identify any specific witness or testimony it seeks to exclude. Defendant Hamilton does not anticipate this becoming an issue at trial, but it is certainly possible to conceive of a scenario where, for example, Plaintiffs decide not to call a critical fact witnesses with an established

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relationship to the Plaintiffs as part of their case in chief. Such a situation could certainly implicate the "missing witness rule," which would allow the jury to infer that the Plaintiffs did not call that witness because his/her testimony would have been unfavorable. *See e.g. State v. Derri*, 17 Wn. App. 2d 376, 407, 486 P.3d 901, 919, *review granted in part,* 198 Wash. 2d 1017, 497 P.3d 389 (2021); Tegland, § 402.8 The missing witness rule—Generally, 5 Wash. Prac., Evidence Law and Practice § 402.8 (6th ed.) ("In both civil and criminal cases, if a party fails to call a particular witness to testify when it would seem natural to do so, an inference may arise that the witness's testimony would have been unfavorable.").

If any such issue were to arise at trial, it would be unexpected, and the resolution would necessarily require a very fact-specific inquiry. Accordingly, the Court should reserve on this motion.

11. The Court should require 24-hour notice of live witnesses.

Defendant Hamilton opposes this motion. The Court already ruled in its pre-trial Order that parties are to give 48-hours' notice.

12. Defendant's financial status, insurance, or policy limits.

Agreed, so long as this ruling applies mutually to both parties. Plaintiffs' counsel must be prohibited from referencing Defendant Hamilton's insurance or referencing any other assets that her estate may have.

13. Effect of jury verdict on insurance rates or cost of medical care.

Agreed so long as Plaintiffs do not open the door in any way.

14. All references to income tax should be excluded.

Defendant Hamilton does not oppose this motion as it relates to income tax only.

15. Plaintiff's financial status or "secondary gain."

Defendant Hamilton agrees that references to "secondary gain" and the parties present financial status should be excluded. However, to any extent Plaintiffs' motion goes beyond that, it is vague and should be denied.

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Specifically, Defendant Hamilton maintains that the financial status of the parents at the time of the care at issue is relevant. The parents paid for Laura Hamilton's care out-of-pocket. Seng Hamilton admitted that one of these reasons they chose Laura Hamilton rather than an obstetrician was to conserve costs. This information is relevant to rebut Plaintiffs' contention that Laura Hamilton should have performed additional prenatal tests and studies.

Moreover, Plaintiffs own vocational expert, Cloie Johnson, has provided a vocational assessment for Z.H. and, for some reason, indicated that Defendant Hamilton should pay for Z.H.'s college tuition and books and supplies in her life care plan. (*See* Supp. Rand Dec. Ex. 10 at 6.) This motion must be denied to any extent Plaintiffs intend it to preclude or prohibit Defendant Hamilton from probing the veracity of these opinions and other evidence introduced by Plaintiffs going to damages.

16. No references to how plaintiff might use the proceeds of any judgment.

This motion is vague. Defendant Hamilton agrees that she will not speculate as to how Z.H. would use any money judgment, imply that it would be squandered, or anything of the sort. But to the extent Plaintiffs intend this motion to go beyond that, it must be denied. Plaintiffs are submitting a life care plan, which delineates what future care needs and services they contend Z.H. will need. This is the very basis of Plaintiffs' future economic damages claim. Defendant Hamilton must be allowed to rebut that contention by contesting the future care needs and services that Plaintiffs are claiming.

17. Attorney's fees, employment of lawyer, and advice of counsel.

Agreed, so long as this ruling applies mutually to both parties.

18. Opinions regarding the truthfulness of witnesses.

Again, this motion is vague. Defendant Hamilton agrees that the Court should exclude personal opinions of counsel and witnesses about whether another witness is lying or telling the truth. This ruling should be applied mutually to both parties.

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However, excluding opinions "on credibility or truthfulness" shall in no way bar witnesses from giving fact or opinion testimony that contradicts testimony of other witnesses. *State v. Stambach*, 76 Wn.2d 298, 456 P.2d 362 (1969). An appropriate motion *in limine* must also not prevent the introduction of evidence relevant to bias. For instance, Defendant Hamilton is permitted to present evidence of a financial or other bias for Plaintiffs' experts that goes to the expert's credibility. Likewise, Defendant Hamilton is certainly permitted to argue and present evidence that Plaintiffs' experts or witnesses have misinterpreted the medical records or other documents in this case. Defense experts are allowed to disagree with the opinions and conclusions of Plaintiffs' experts and explain why Plaintiffs experts are incorrect.[1] These are the types of issues that expert witnesses routinely address during their testimony. Not allowing the defense or their experts to impeach Plaintiffs experts' or rebut their opinions would be extremely prejudicial and contrary to the Evidence Rules.

Furthermore, three lay people with no professional expertise in birth were present at the birth. Their testimony was provided to experts. Experts have opinions about the reliability of this testimony which should be allowed. For those inexperienced in observing normal birth, any birth may appear violent and traumatic. Experts are not expected to testify that the testimony of the lay witnesses is untruthful, but that it is unreliable and an inaccurate memory of events occurring years earlier. Plaintiff's counsel has declined to say whether these witnesses will be called or whether experts will rely on their testimony. Full exploration of the reliability of that testimony is essential to the defense. In short, to any extent that this motion seeks to exclude valid argument and evidence for impeachment, it must be denied.

[1] *See* Tegland, § 705.7 Cross-examination and impeachment of experts—Scope of cross-examination, 5B Wash. Prac., Evidence Law and Practice § 705.7 (6th ed.) ("Expert A can be asked whether his or her opinion differs from that of Expert B, who testified previously. The question goes to the weight of Expert A's opinion and is perfectly proper.")

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19. Vouching testimony.

Defendant Hamilton opposes this motion. Plaintiffs cite no authority for this motion, and there is no indication of what specific "vouching" testimony Plaintiffs seek to exclude. This is exactly the sort of vague and nonspecific motion *in limine* that Washington courts routinely reject. *Fenimore v. Donald M. Drake Const. Co.*, 87 Wash. 2d 85, 91, 549 P.2d 483, 488 (1976) (motion *in limine* should only be granted "if it describes the evidence which is sought to be excluded with sufficient specificity to enable the trial court to determine that it is clearly inadmissible ...") If an issue arises at trial, the Court will be in the correct position to make a ruling based upon the evidence offered and subject to the objections of the parties.

In this case, expert witnesses will be called to comment on their opinions as well as the testimony of other witnesses. Expert witnesses must certainly be permitted to agree or disagree with other experts. An expert must also be allowed to defer to the testimony of other witnesses, especially when the other witness testifies on a different area of expertise. Expert testimony of this sort is not "vouching" and is certainly not prohibited under Washington law or the Rules of Evidence. There is no legal basis for Plaintiffs' motion and therefore, it should be denied.

20. "Golden Rule" Argument.

Agreed, so long as long as this ruling applies mutually to all parties.

21. Jury nullification.

Agreed, so long as this ruling applies mutually to all parties.

22. Personal opinion.

Agreed, so long as this ruling applies mutually to counsel for all parties.

23. Preclude admission of Medical Records.

Defendant Hamilton opposes this motion. Plaintiffs' request to preclude the admission of medical records is contrary to law and common sense. This is a medical

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negligence case, requiring medical experts to opine on standard of care, proximate cause, and damages. Such a case inherently implicates Z.H.'s medical records.

Defense and Plaintiffs' medical experts have reviewed Z.H.'s medical records to arrive at their opinions. Medical records are admissible under ER 803(4) and RCW 5.45.020. "A practicing physician's records, made in the regular course of business, properly identified and otherwise relevant, constitute competent evidence of a condition therein recorded." *State v. Ziegler*, 114 Wn.2d 533, 538-39, 789 P.2d 79, 82 (1990). The Uniform Business Records Act, RCW 5.45.020, is regularly applied to medical records:

> As applied to hospital records, compliance with the act obviates the necessity, expense, inconvenience, and sometimes impossibility of calling as witnesses the attendants, nurses, physicians, X ray technicians, laboratory and other hospital employees who collaborated to make the hospital record of the patient. It is not necessary to examine the person who actually created the record so long as it is produced by one who has the custody of the record as a regular part of his work or has supervision of its creation.

Ziegler, 114 Wn.2d at 538 (quoting *Cantrill v. American Mail Line, Ltd.*, 42 Wn.2d 590, 608, 257 P.2d 179 (1953)). If Plaintiffs have objections to particular portions of the medical records, they are free to object to those portions and provide relevant grounds for the objection. *See Allen v. Fish*, 64 Wn.2d 665, 670-71, 393 P.2d 621, 624 (1964).

There is no legal authority under which to preclude the jury from reviewing medical records that the experts reviewed as the basis for their opinions and will testify to. Furthermore, Plaintiffs' experts' opinions put Z.H.'s medical records directly into play. There is no legitimate basis for a blanket order precluding medical records from being admitted into evidence. Nor is there any reason to believe that the jury will be confused by medical records admitted into evidence. The admission of medical records in a case involving allegations of medical negligence is routine, common sense, and should be permitted. That said, the defense is agreeable to consideration of specific portions of records to be admitted or not depending on how the testimony develops.

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24. Experts referencing evidence ruled inadmissible.

Defendant Hamilton opposes this Motion in *limine*. It is well settled that experts are permitted to rely upon inadmissible evidence in forming their opinions if it is the type of evidence reasonably relied upon by experts in the particular field. ER 703 expressly allows an expert to express an opinion based upon facts or data "reasonably relied upon by experts in the particular field in forming opinions or inferenced upon the subject." An expert may even disclose such information if required by the court. ER 705. These are propositions recognized by the very cases Plaintiffs cite. *See State v. Martinez*, 78 Wn. App. 870, 879-81, 899 P.2d 1302 (1995) (evidence rules allow experts to rely on inadmissible evidence and testify about it if directed by the court, though not to "bootstrap" into evidence hearsay that is not necessary to help understand the expert's opinion); *State v. Nation*, 78 Wn. App. 870, 662-64, 41 P.3d 1204 (2002). Those cases make clear that experts are allowed to rely on inadmissible evidence, and under the appropriate circumstances may testify about such evidence.

This motion should be denied. If an issue arises at trial, the parties may make an appropriate objection and the Court would be well-positioned to make a ruling based on the specific facts and circumstances presented.[2]

25. Evidence not disclosed by Defendant in response to Plaintiffs' discovery request.

This motion should be denied as vague and nonspecific. As outlined in Defendant Hamilton's response to MIL No. 7, above, the exclusion of any evidence for untimely disclosure would require the Court to perform a *Burnet* analysis on the record, considering the specific facts and circumstances. This motion should be denied.

[2] *Fenimore v. Donald M. Drake Const. Co.*, 87 Wash. 2d 85, 91, 549 P.2d 483, 488 (1976) (motion *in limine* should only be granted "if it describes the evidence which is sought to be excluded with sufficient specificity to enable the trial court to determine that it is clearly inadmissible ...")

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26. Collateral sources.

Defendant Hamilton does not oppose this motion, so long it is in no way construed to limit or exclude valid evidence of past collateral source payments under RCW 7.70.080.

27. Disclosure of illustrative and demonstrative exhibits.

Agreed, so long as the ruling is applied mutually to both parties.

28. Events from Dr. Freeman's past.

Defendant Hamilton opposes this motion in part. Dr. Freeman's academic discipline for dishonesty goes directly to his character for truthfulness under ER 608(b) and should be admitted. Defense counsel agrees not to ask Dr. Freeman about his prior lawsuits unless the door is opened.

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

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

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

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Dr. Freeman is a professional expert having testified well over a thousand times around the country. When he was in chiropractic school, he was suspended for a term because he was found to have been fraudulently taking credit for patients that he had not seen and submitting falsified documentation for the same. (*See* Rand Decl. [5/19/2022] Ex. G at 117:8-118:12; Supp. Rand Decl. Ex. 18.) Dr. Freeman has been asked about this countless times during depositions and at trial and he admits to having engaged in this misconduct. (*See* Rand Decl. Ex. G at 118:5-12.) The fact that Dr. Freeman lied about patients he had not seen and falsified records to maintain his deception reflects conduct that goes *directly* to his character for truthfulness. Defense Counsel should be able to question Dr. Freeman about this on cross examination within the parameters of ER 608(b).

Other Courts, including the Western District of Washington have agreed. For example, in *Hausman v. Holland Am. Line-USA*, No. 13CV00937 BJR, 2015 WL 9839747, at *3 (W.D. Wash. Aug. 21, 2015), the district court held as follows:

> **With respect to the fact that, as a student, Dr. Freeman falsely took credit for patients that he had not seen, the Court finds that this goes to his credibility and is proper impeachment evidence.** *See* Fed.R.Evid. 608(a) (explaining that extrinsic evidence is normally not admissible "to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness" but that "the court may, on cross-examination, allow them to be inquired into if they are probative of the [witness's] character for truthfulness or untruthfulness"). That said, Plaintiff correctly notes that any disciplinary action which was taken by the school, namely, the fact that Dr. Freeman was suspended for a term, is prohibited extrinsic evidence and will not be allowed. *See* Advisory Committee Notes on 2003 Amendment ("Rule 608(b) prohibits counsel from mentioning that a witness was suspended or disciplined for the conduct that is the subject of impeachment, when that conduct is offered only to prove the character of the witness."). Accordingly, with respect to the testimony of Dr. Freeman, Defendants' motion is denied and Plaintiff's motion is granted in part and denied in part.[3]

[3] In *Hausman,* the defendant also moved to exclude Dr. Freeman due to "credibility issues," under ER 403, citing to several instance where his testimony was excluded in other cases. Although the district court denied this request, it commented: "Clearly, other courts have had issues with accepting Dr. Freeman's expert testimony in the past." *Hausman v. Holland Am. Line-USA*, No. 13CV00937 BJR, 2015 WL 9839747, at *3 (W.D. Wash. Aug. 21, 2015).

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There is no issue with extrinsic evidence here because Dr. Freeman admitted during his deposition that he committed these dishonest acts. Thus, defense counsel does not anticipate there being any need to introduce the letter confirming his suspension.

Plaintiffs' primary argument is that this incident should be excluded because it is too remote in time. While it is true that the Court has discretion to exclude remote incidents, this is but one of several factors that must be considered. Specifically, the Court must additionally consider whether the misconduct is relevant to the witness's veracity on the stand and whether it is relevant to the issues presented at trial. *State v. O'Connor*, 155 Wn.2d 335, 349, 119 P.3d 806, 813 (2005); *State v. McSorley*, 128 Wn. App. 598, 613, 116 P.3d 431, 439 (2005); *State v. York*, 28 Wn. App. 33, 35-37, 621 P.2d 784 (1980) (witness's prior misconduct while working as an undercover informant was relevant to credibility in case where witness was undercover buyer and sole witness to the crime). Both conditions are satisfied here. Dr. Freeman's misconduct is an explicit act of dishonesty and deception. Moreover, Dr. Freeman relies heavily on his academic credentials, professorships, and background to bolster his credibility. This act of misconduct is highly relevant to his testimony in this respect because it occurred in an *academic* setting. Again, many courts around the country, including the Western District of Washington, have ruled that this specific incident of conduct is admissible to impeach Dr. Freeman under ER 608(b).

As one additional point, Plaintiffs claim that the Court in *Harbottle v. Braun*, 10 Wn. App. 2d 374, 381, 447 P.3d 654, 658 (2019) excluded "prior acts occurring in 2003 and 2005 in a 2015 trial." This is misleading, at best. In *Harbottle*, the defendant doctor failed to disclose in discovery investigations by the Medical Quality Assurance Commission in 2003 and 2005 concerning allegations of sexual misconduct. *Id.* at 381-382. Plaintiffs' theory was that it was the act of failing to disclose these investigations that was relevant and admissible under ER 608(b), not the actual investigations themselves as these had nothing to do with the defendant's character for truthfulness. *Id.* Indeed, citing to ER 608(b), the Court

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specifically stated: "The Estate has not explained how the underlying sexual misconduct would have been relevant at trial for any reason since it has nothing to do with [defendant's] veracity." *Id.* at FN 5. Dr. Freeman's academic misconduct is nothing like what was at issue in *Harbottle*.

29. Dr. Freeman's Amicus Brief.

Defendant Hamilton agrees not to reference the amicus brief directly that Dr. Freeman filed in *Myhre* so long as the door is not opened. However, the fact that Dr. Freeman has been retained by Plaintiffs' counsel multiple times is fair game and goes directly to bias. If Plaintiffs want to agree that all parties will refrain from asking about other times when the plaintiff and defense law firms have retained a particular expert, that is agreeable.

30. Dr. Gurewitsch-Allen's brachial plexus case.

Defendant Hamilton opposes this motion. Dr. Gurewitsch-Allen's central opinion is that permanent brachial plexus injures can only be caused by excessive traction and that Laura Hamilton was thus negligent. (*See* Rand Decl. [5/19/2022] Ex. J at 8; *see also* Supp. Rand Decl. Ex. 19 at 25, 82:9-22.) However, one of Dr. Gurewitsch-Allen's own patients suffered a permanent brachial plexus injury. That case resulted in a lawsuit, during which Dr. Gurewitsch-Allen maintained that she complied with the standard of care. (*See* Supp. Rand Decl. Ex. 19 at 24-25, 91:19-92:6.) This is **highly relevant** and goes directly to the credibility of her central opinions on standard of care and proximate causation.

Evidence of Dr. Gurewitsch-Allen's permanent brachial plexus injury does not implicate ER 608(b) because it is not a prior "bad act" that goes to her character for truthfulness. Rather, this evidence cuts directly to the heart and veracity of her central criticisms and opinions against Laura Hamilton. Dr. Gurewitsch-Allen claims that these injuries can only result from one thing: excessive traction. From that, she concludes that Laura Hamilton was negligent. And yet, with respect to her own permanent brachial plexus injury, Dr. Gurewitsch-Allen believes that her care was appropriate. The jury is entitled to

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know about this inconsistency and draw their own conclusions based on whether they are satisfied with Dr. Gurewitsch-Allen's explanation.

Even if Dr. Gurewitsch-Allen's permanent brachial plexus injury did implicate ER 608(b), it is still admissible for reasons discussed in response to MIL 28, above. This incident is not so remote in time to justify exclusion, particularly where it is **highly relevant** to the central issues in the case. *State v. McSorley*, 128 Wn. App. 598, 613, 116 P.3d 431, 439 (2005); *State v. York*, 28 Wn. App. 33, 35-37, 621 P.2d 784 (1980).

31. Dr. Allen and Dr. Gurewitsch-Allen's marriage and daughter.

This motion is opposed. The fact that Plaintiffs' two experts, Dr. Gurewitsch-Allen and Dr. Allen are married to each other is relevant. It goes to bias and the credibility of their opinions. Both experts testified that permanent brachial plexus injuries can only be caused by excessive traction from the birth attendant. (*See e.g.* Rand Decl. [5/19/2022] Ex. J.) Dr. Gurewitsch-Allen and Dr. Allen have offered some variation of this opinion in *many* other lawsuits. (*See* Supp. Rand Decl. Ex. 4 at 88.) This is a significant source of their collective income, and they have, in essence, made a family business out of it. The jury is certainly entitled to conclude that their relationship affects the credibly of their opinions. It goes directly to bias.

The daughter, Niva Gurewitsch, is relevant because she is the administrative assistant for both Dr. Gurewitsch-Allen and Dr. Allen. (*See* Supp. Rand Decl. Ex. 4 at 7-11.) During his deposition, Dr. Allen testified that he had not talked about this case with his wife. In fact, he claimed that he "didn't know she was on it until I saw the deposition." (*Id.* at 19:4-13.) This is difficult to believe given that Dr. Allen and Dr. Gurewitsch-Allen are married, and both use their daughter as an administrative assistant. This also goes to bias and the credibility of Dr. Allen's testimony. Outside of this specific point, defense counsel does not intend to reference or inquire about Niva Gurewitsch any further, so there is no basis to exclude this evidence under ER 403.

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32. Prohibition regarding reputation of defendant.

Defendant Hamilton agrees so long that this ruling be applied mutually to the parties. All character evidence should be excluded. ER 404.

However, contrary to Plaintiffs' claim, "experience" is not character evidence. Defendant Hamilton is entitled, and indeed required, to establish a foundation for Laura Hamilton's education, training, and experience as a midwife (i.e. number of deliveries, years in practice, etc.). This is not character evidence.

It should also be noted that Plaintiffs concede that that the DOH matters and prior lawsuits relating to Laura Hamilton are inadmissible—otherwise there would be no need for a "door" to be opened to make them admissible.

33. Abortions.

Defendant Hamilton agrees not to reference Seng Hamilton's two prior abortions, provided that Plaintiffs do not open the door to this evidence in any way.

Specifically, the evidence shows that Seng Hamilton did not disclose these prior abortions to Laura Hamilton. Thus, at the time of Z.H.'s pregnancy, Laura Hamilton believed that the mother only had three prior pregnancies. In fact, Z.H. was Seng Hamilton's sixth pregnancy. This makes her a "grand multiparous," which is a classification that can carry a greater risk of fetal and birth complications. During the deposition of Defendant Hamilton's midwife expert, Ms. Burgess, Plaintiffs' counsel inquired about this as follows:

> Q. Do you know what [sic] means for a woman to be grand multiparous?
>
> A. I believe it's six or more. I may be wrong about that. I don't get very many grand multips.
>
> ...
>
> Q. What about grand multiparity? Is that a risk factor for shoulder dystocia?
>
> A. It could be. ...

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(*See* Supp. Rand Decl. Ex. 20 at 59:20-23, 70:18-20.) If Plaintiffs' counsel elicits such testimony at trial, or anything similar suggesting that Seng Hamilton was at greater risk for shoulder dystocia due to the total number of pregnancies she had prior to Z.H., then that opens the door wide open to her prior abortions and Seng Hamilton's failure to disclose them.

34. Religious beliefs or political views.

Agreed, provided this ruling applies to both parties mutually. Again, this motion is largely moot considering the parties' stipulation on "act of God" and religion.

35. Failure to mitigate damages.

This motion is a waste of the parties and court's time. Defendant Hamilton did not plead or raise the affirmative defense of failure to mitigate. Plaintiffs cite no evidence even suggesting that the defense intends to argue it at trial.

The evidence shows that there have been times when the family did not take Z.H. for care that was recommended. This is admissible as it speaks to whether or not the future care needs for Z.H. alleged by Plaintiffs are reasonable and necessary. It does not go to a failure to mitigate defense.

36. Appellate action.

Agreed, so long as the ruling is applied mutually to both parties.

37. Juror names.

Agree, so long as this ruling is applied to both parties mutually.

38. Remarks or arguments about the age or inexperience of counsel.

Agreed, so long as the ruling is applied mutually to both parties.

39. Preclude testimony or argument about midwives in other countries.

Defendant Hamilton opposes this motion as vague and nonspecific. Plaintiffs have not cited any testimony or evidence at issue, rendering this pure speculation. *Fenimore v. Donald M. Drake Const. Co.,* 87 Wn.2d 85, 91, 549 P.2d 483, 488 (1976) (motion *in limine*

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should only be granted "if it describes the evidence which is sought to be excluded with sufficient specificity to enable the trial court to determine that it is clearly inadmissible ...") Moreover, Plaintiffs own midwife expert, Ms. Wilkinson, was trained and practiced as a midwife in Australia during her early career. If an issue arises at trial, Plaintiffs can raise their objection and the Court will be able to make a ruling considering the surrounding facts and circumstances. But a blanket order *in limine* should not be entered.

40. Seng Hamilton's attorney discipline.

Defendant Hamilton opposes this motion. The relevance and admissibility of Seng Hamilton's attorney discipline under ER 608(b) is well briefed in Defendant Hamilton's MIL No. 24, which is hereby incorporated by reference.

41. Marital difficulties.

Agreed, so long as this ruling applies mutually to both parties and Plaintiffs do not open the door to this evidence in any way at trial.

DATED this 26th day of May, 2022, at Seattle, Washington.

JOHNSON, GRAFFE, KEAY,
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/s/ Donna M. Moniz
/s/ R. Pierce Rand

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CERTIFICATE OF SERVICE

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

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Via Email

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

EXECUTED this 27th day of May 2022, at Seattle, WA.

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