



FILED
LEWIS COUNTY

2022 MAY 27 PM 12: 00

SUPERIOR COURT
CLERK'S OFFICE

*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' MOTION
TO ADMIT EVIDENCE OF OTHER
PERMANENT BRACHIAL PLEXUS
INJURIES

I. RELIEF REQUESTED

Plaintiffs' attempt to admit evidence of the prior brachial plexus injury sustained by Levi Myhre is a classic example of impermissible character evidence under ER 404(b). The only reason Plaintiffs want to inject this into the trial is to create the inference that Laura Hamilton must have been negligent because permanent brachial plexus injuries are rare, and she had two of them in her career. Quite literally, such an argument asks the jury to disregard the actual evidence in the case and render a verdict based on speculation and prejudice. This Court addressed this exact same issue in *Myhre* and properly excluded evidence of prior brachial plexus injuries. There is no reason for a different decision here. Evidence of other "bad outcomes," including the prior brachial plexus injury sustained by Levi Myhre, must be excluded under ER 402, 403, and 404(b).

DEFENDANT HAMILTON'S RESPONSE TO PLAINTIFFS' MOTION TO
ADMIT EVIDENCE OF OTHER PERMANENT BRACHIAL PLEXUS
INJURIES- 1

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

1 This Response follows.¹

2 **III. ISSUE**

3 (1) Should evidence of the prior brachial plexus injury sustained by Levi Myhre
4 be excluded where such evidence is irrelevant under ER 402 and classic character evidence
5 under ER 404(b)?

6 (2) Should evidence of the prior brachial plexus injury sustained by Levi Myhre
7 be excluded under ER 403 due to the massive prejudice and concomitant dangers of
8 misleading and confusing the jury?

9 **IV. EVIDENCE RELIED UPON**

10 Defendant Hamilton relies on the Declaration of R. Pierce Rand and the 1st
11 Supplemental Declaration of R. Pierce Rand, and the pleadings and papers already on file
12 with the Court.

13 **V. AUTHORITY**

14 **A. Evidence of the prior brachial plexus injury sustained by Levi Myhre is classic
15 character evidence and inadmissible under ER 404(b).**

16 “E]vidence of prior misconduct is presumptively inadmissible.” *State v. Gresham*,
17 173 Wn.2d 405, 421, 269 P.3d 207, 213–14 (2012). ER 404(b) provides that evidence of
18 other alleged bad acts “is inadmissible to prove the character of a person in order to show
19 action in conformity therewith.” *Carson v. Fine*, 123 Wn.2d 206, 221, 867 P.2d 610, 619
20 (1994) (citing ER 404(b)). The rule prohibits admission of evidence to show that the
21 defendant was negligent on other occasions to demonstrate the likelihood that he was again
22 negligent in the case at hand.² *Dickerson v. Chadwell, Inc.*, 62 Wn. App. 426, 432-33, 814
23 18 P.2d 687 (1991). The Rule applies equally in civil and criminal cases. *See e.g. Saldivar*
24 *v. Momah*, 145 Wn. App. 365, 395, 186 P.3d 1117, 1133 (2008), *as amended* (July 15, 2008).

25 ¹ Defendant Hamilton separately moved for exclusion of this same evidence in Defense MIL No. 6. The
26 authority and arguments set forth in that motion are hereby incorporated by reference.

² *See also Hizey v. Carpenter*, 119 Wn.2d 251, 269, 830 P.2d 646 (1992) (finding no abuse of discretion in
excluding from legal malpractice case evidence of defendant’s later “breaches of fiduciary duty;” evidence
“could easily have misled or confused the jury” and was only offered to “bolster” plaintiffs’ contention that
defendant was “insensiriv[e] to ... ethical rules”)

1 Here, evidence of the prior brachial plexus injury sustained by Levi Myhre is classic
2 character evidence under ER 404(b). Plaintiffs obviously want to introduce this evidence to
3 support an improper character inference of carelessness and/or negligence—i.e. because
4 permanent brachial plexus injuries are rare, and because Laura Hamilton had two of them in
5 her 30+ year career, it is more likely that she was negligent in this case. This is improper and
6 prohibited by ER 404(b).

7 **B. Plaintiffs' "rebuttal" theory fails.**

8 Although ER 404(b) prohibits admission of prior bad acts to prove conformity
9 therewith, such evidence may be admitted for non-character reasons where relevant to prove:
10 "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake
11 or accident." ER 404(b).

12 Plaintiffs' counsel recognizes that evidence of the prior brachial plexus injury runs
13 afoul of the character evidence rule, and thus argues that it is relevant for a non-character
14 reason: to "rebut" Defendant Hamilton's theory of natural forces of labor. But Plaintiffs'
15 counsel completely fails to explain *how* this evidence rebuts the defense theory in any way.
16 Indeed, all that they say is the following:

17 Plaintiff seeks to offer this evidence for the narrow purpose of rebutting
18 defendant's alternative theory of causation that Z.H.'s injuries were caused
19 by the "natural forces of labor." Because plaintiff has identified a proper
20 purpose for admission of this prior act evidence, the evidentiary analysis
shifts to the ER 403 balancing test."

21 (Pl.'s Mot at 4:10-16.) Plaintiffs cannot overcome the strong "presumption" against
22 character evidence with nothing more than the conclusory assertion that they have identified
23 a proper purpose. *Gresham*, 173 Wn.2d 421.

24 The reason that Plaintiffs did not explain their "rebuttal" theory is that it is nothing
25 more than pretext. *See Dickerson*, 62 Wn. App. at 432 (rejecting argument that evidence that
26 plaintiff had previously slapped his girlfriend was admissible under ER 404(b) as "rebuttal")

1 evidence.) The fact that permanent brachial plexus injuries are rare and the fact that Laura
2 Hamilton had two of them does not, in any way, rebut or disprove the prevailing medical
3 theory that the natural forces of labor can and do cause such injures. It does not disprove the
4 science behind the natural forces of labor theory, which has been endorsed by ACOG, the
5 most prominent medical association in the obstetrics field. Indeed, Plaintiffs have not even
6 attempted to demonstrate that the circumstances and complications surrounding Levi
7 Myhre's birth were substantial the same as in Z.H.'s case, because they were not.

8 The only possible purpose this evidence could serve is to suggest to the jury that it
9 is more likely that Laura Hamilton did something wrong because these injuries are rare. Not
10 only is this plainly prohibited by ER 404(b), it is also pure speculation and simply not how
11 statistics work. Even Plaintiffs' own epidemiology expert recognizes that "rare things do
12 happen." (*See* Rand Decl. [5/19/2022] Ex. G at 46:9-11.) And it is for that very reason that
13 RCW 7.70.040 requires the plaintiff to prove proximate causation based on the *specific*
14 medical facts and evidence in the case. *Reyes v. Yakima Health Dist.*, 191 Wn.2d 79, 86-88,
15 419 P.3d 819, 823 (2018); *Stone v. Sisters of Charity of The House of Providence*, 2 Wn.
16 App. 607, 611, 469 P.2d 229 (1970); WPI 105.07 ("a poor medical result is not, by itself,
17 evidence of negligence").

18 Moreover, Washington law sets a high bar for the introduction of character evidence
19 for "other" non-character purposes: "To admit evidence of a person's prior misconduct, 'the
20 trial court must (1) find by a preponderance of the evidence that the misconduct occurred,
21 (2) identify the purpose for which the evidence is sought to be introduced, (3) determine
22 whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the
23 probative value against the prejudicial effect.'" *Gresham*, 173 Wn.2d at 421 (internal
24 citations omitted). Plaintiffs have not even come close to carrying their burden under this
25 rigorous standard. Indeed, it is *impossible* for Plaintiffs to satisfy the first requirement
26 because the jury in *Myhre* found that Laura Hamilton was not negligent and not at fault for

1 the injury that Levi Myhre sustained. Stated plainly, the law has already absolved Laura
2 Hamilton of any "misconduct" for Levi Myhre's injury, so that cannot be used here to
3 support Plaintiffs' claims of negligence.

4 **C. Evidence regarding the prior brachial plexus injury is irrelevant and unduly**
5 **prejudicial under ER 403.**

6 Washington Courts have consistently held that "[e]vidence of a previous similar
7 accident involving a party generally is inadmissible to show a lack of care by the same party
8 as the cause of the accident in question. Such evidence is irrelevant concerning the cause of
9 the instant accident since innumerable factors and causes present in the situation may not
10 have been present previously and vice versa." *Hammel v. Rife*, 37 Wn. App. 577, 585, 682
11 P.2d 949, 954 (1984) (internal citations omitted).³

12 As such, evidence of the prior brachial plexus injury sustained by Levi Myhre is
13 completely irrelevant. The jury must reach its decision here based on the facts, evidence, and
14 expert testimony in the present case alone. ER 401, 402. Permitting the Plaintiffs to introduce
15 evidence regarding the *Myhre* case would be gravely prejudicial and encourage the jury to
16 render a verdict based on speculation rather than the actual evidence.

17 Furthermore, the jury in *Myhre* found that Laura Hamilton was not negligent or at
18 fault for the injury that Levi Myhre sustained. The jury specifically found that Laura
19 Hamilton met the standard of care for a reasonably prudent midwife. It would be manifestly
20 improper, prejudicial, and misleading for Plaintiffs' counsel to suggest or imply that the facts
21 in the *Myhre* case support their claim that Laura Hamilton was negligent in her care of Z.H
22 here. ER 403.⁴ The decision in *Myhre* is final. The Court should categorically reject
23 Plaintiffs' counsel's attempt to relitigate that case by injecting it into the present proceedings.

24 ³ As stated above, Plaintiffs have provided no evidence that circumstances surrounding the birth complications
25 of Levi Myhre and Z.H. were identical, which they were not.

26 ⁴ It should be noted that ER 403 carries extra weight in the context of evidence purportedly being admitted for
"other purposes" under ER 404(b). *See State v. Jackson*, 102 Wn.2d 689, 693, 689 P.2d 76, 78 (1984) (requiring
ER 403 balancing to be done on the record). "In its analysis, the court should consider how probative the
evidence is; *i.e.*, how directly the misconduct tends to prove the crime charged. If the misconduct is highly
probative, the balance may be tipped towards admissibility. If the misconduct is of only marginal relevance

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

It must be emphasized that in *Myhre* the Court properly granted the defense motion to exclude reference to the brachial plexus injury that Z.H. had sustained in the present case for the same reasons articulated here. There is no basis for a different outcome. Indeed, Defendant Hamilton's position is even *stronger* now because the jury in *Myhre* found that she met the standard of care and absolved her of any fault for the *Myhre* injury. It would be manifestly improper and prejudicial for Plaintiffs' counsel to now try and use the facts of the *Myhre* case to support their claim of negligence against Laura Hamilton.

For all these reasons, Defendant Hamilton requests that the Court deny Plaintiffs' motion and grant her MIL No. 6.

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

JOHNSON, GRAFFE, KEAY,
MONIZ & WICK, LLP

/s/ Donna M. Moniz
/s/ R. Pierce Rand

Donna M. Moniz, WSBA #12762
R. Pierce Rand, WSBA #49736
Attorneys for Defendant Hamilton
925 Fourth Avenue, Suite 2300
Seattle, WA 98104

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

CERTIFICATE OF SERVICE

I declare that on the date below I served this *Defendant Hamilton's Response to Plaintiffs' Motion to Admit Evidence of Other Permanent Brachial Plexus Injuries* on the following parties of record in the manner described:

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

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

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

/s/Monica M. Welch
Monica M. Welch, Legal Assistant