



FILED
LEWIS COUNTY
HONORABLE JAMES W.

2022 MAY 31 AM 11:00
Date of Hearing: June 1, 2022 @ 9:00 a.m.

SUPERIOR COURT
CLERK'S OFFICE

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

SCOTT HAMILTON, as guardian ad litem for
Z.H.,

Plaintiffs,

vs.

LINDA AMONDSO-N-MULLER, Personal
Representative of the ESTATE of LAURA
HAMILTON,

Defendants.

)
) NO. 20-2-00543-21
)

) REPLY IN SUPPORT OF
) PLAINTIFF'S MOTION TO
) ADMIT EVIDENCE OF PRIOR
) PERMANENT BRACHIAL
) PLEXUS AVULSION INJURIES
) OCCURRING UNDER LAURA
) HAMILTON'S CARE

I. INTRODUCTION

Plaintiff respectfully requests the Court admit evidence of prior permanent brachial plexus avulsion injuries occurring under Laura Hamilton's care to rebut defendant's "natural forces of labor" defense – an alternative theory of causation. Plaintiff has correctly identified three bases for admission of this evidence:

- 1) Rebutting the natural forces of labor defense.
- 2) Rebutting the injection of character evidence into this trial by defendant Hamilton.
- 3) Impeaching the sworn testimony of Dr. DeMott, defendant Hamilton's standard of care expert.

This motion addresses the first basis. Other briefing filed in response to defendant Hamilton's Motions in Limine addresses the second and third bases. Plaintiff anticipates additional

REPLY IN SUPPORT OF PLAINTIFF'S MOTION TO
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HAMILTON'S CARE - 1

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1 bases for admission are likely to arise during trial.

2 Plaintiff submits the following reply in support of Plaintiff's Motion to Admit Evidence of
3 Prior Permanent Brachial Plexus Avulsion Injuries Occurring Under Laura Hamilton's Care:

4 **II. ARGUMENT**

5 **A. Defendant Hamilton Fundamentally Misunderstands the Basis of Plaintiff's**
6 **Motion.**

7 Defendant Hamilton claims that plaintiff "want[s] to introduce this evidence to support
8 an improper character inference of carelessness and/or negligence." This is incorrect. Plaintiff's
9 motion requests the evidence be admitted for the narrow purpose of rebutting the natural forces of
10 labor defense – an alternative theory of causation. As indicated in the Motion, if the evidence is
11 admitted for this purpose, plaintiff will not make any conformity argument and will stipulate that
12 the evidence not be used to show conformity.
13

14 **B. Defendant Hamilton's Response Ignores Plaintiff's Rebuttal Argument.**

15 Defendant Hamilton's Response ignores plaintiff's argument entirely instead of addressing
16 it on the merits. Defendant Hamilton's Response claims "[p]laintiffs' counsel completely fails to
17 explain how this evidence rebuts the defense theory in any way." This is again incorrect. Plaintiff's
18 rebuttal argument is simple: defendant Hamilton is going to argue to the jury that Z.H.'s injury was
19 caused by an extremely rare but natural phenomenon – the natural forces of labor. However, the
20 rate of occurrence for this injury under Laura Hamilton's care was **at least** 44.4 times greater than
21 average during the time of the care at issue, based on agreed upon medical statistics. This alone
22 rebuts the defense claim that an extremely rare but natural phenomenon caused Z.H.'s injury.
23 Experts for both parties agree that the actual rate of occurrence under Laura Hamilton's care was
24

1 likely much higher given the fact that nerve avulsions are a rare subset of all permanent brachial
2 plexus injuries.

3 Defendant Hamilton has chosen to make this argument the centerpiece of their defense.
4 The defense is free to argue that Z.H.'s injury was caused by an extremely rare but natural
5 occurrence during the second stage of labor and nothing midwife Hamilton did or failed to do
6 affected his outcome. However, this opens the door to rebuttal regarding the rate of occurrence for
7 this injury under Laura Hamilton's care. The Court should not permit the defendant to introduce
8 this topic, make it central to their defense, and then keep highly probative rebuttal evidence hidden
9 from the jury. This is misleading.

10
11 Instead of addressing plaintiff's argument, defendant Hamilton ignores it and attacks a
12 straw man. Defendant Hamilton's response states "[t]he fact that permanent brachial plexus injuries
13 are rare and the fact that Laura Hamilton had two of them does not, in any way, rebut or disprove
14 the prevailing medical theory that the natural forces of labor can and do cause such injuries."
15 Defendant's argument misses the point entirely. This purpose of this evidence is not to rebut the
16 defense theory that the natural forces of labor can cause permanent multi-level avulsion injuries.
17 The purpose of this evidence is to rebut the claim by defendant Hamilton that this extremely rare
18 phenomenon occurred in this case. In other words, this evidence rebuts defendant Hamilton's
19 specific theory of causation, rather than the general defense theory of causation.

20
21 **C. Defendant Hamilton Misapplies ER 404(b).**

22 Defendant Hamilton argues that "the law has already absolved Laura Hamilton of any
23 'misconduct' for Levi Myhre's injury, so that cannot be used here." However, ER 404(b) is not
24 limited to acts deemed misconduct. As the Supreme Court of Washington explained in *State v.*

1 *Everybodytalksabout*,¹ “acts inadmissible under ER 404(b) include any acts used to show the
2 character of a person to prove the person acted in conformity with it on a particular occasion.” The
3 rule applies whenever past actions, misconduct or otherwise, are used to show conformity between
4 past and present.

5 Defendant Hamilton correctly cites the test for admission of 404(b) evidence but then
6 misapplies it. Before admitting Wash. R. Evid. 404(b) evidence, a trial court must (1) find by a
7 preponderance of the evidence that the [act] occurred, (2) identify the purpose for which the
8 evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an
9 element of the [claim], and (4) weigh the probative value against the prejudicial effect. *State v.*
10 *Foxhoven*, 161 Wash. 2d 168, 171, 163 P.3d 786, 787 (2007). Here it is undisputed that both
11 Z.H. and Levi Myhre suffered multi-level permanent brachial plexus avulsion injuries under
12 Laura Hamilton’s care, the evidence is being introduced to rebut the “natural forces of labor”
13 defense, and the evidence is relevant as the extremely elevated rate of occurrence rebuts the
14 central defense theory. This leaves only the element (4) – the ER 403 balancing test.

15
16 Defendant Hamilton will surely argue this evidence carries a danger of prejudice.
17 Ordinarily, that would be correct. However, the probative value of this evidence has dramatically
18 increased given the defense decision to center their defense around an alternative theory of
19 causation – that Z.H.’s injury was caused by an incredibly rare natural phenomenon – rather than
20 argue Laura Hamilton did not breach the standard of care. As the Supreme Court of Washington
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23 _____

24 ¹ *State v. Everybodytalksabout*, 145 Wash. 2d 456, 465, 39 P.3d 294, 300 (2002).
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1 explained in *State v. Perez-Valdez*,² “[i]n determining whether there is prejudice, the linchpin
2 word is ‘unfair.’ Almost all evidence is prejudicial in the sense that it is used to convince the
3 trier of fact to reach one decision rather than another.” *See also* 5 KARL B. TEGLAND,
4 WASHINGTON PRACTICE: EVIDENCE § 106, at 249 (2d ed. 1982). The *Perez-Valdez* Court further
5 explained that “ER 403 does not operate to exclude crucial evidence relative to a party’s central
6 contention.” Defendant Hamilton’s decision to center its defense around the “natural forces of
7 labor” theory has tipped the ER 403 balancing test in favor of admission.
8

9 Trials are about truth-seeking. The Court should not permit the defendant to assert this
10 theory while keeping probative rebuttal evidence hidden from the jury.

11 III. CONCLUSION

12 Defendant Hamilton has made the tactical decision to center its defense around an
13 alternative theory of causation that Z.H.’s injuries were caused by an extremely rare but natural
14 phenomenon – the natural forces of labor. By introducing this topic, defendant Hamilton has opened
15 the door to exploration by both sides, which includes rebuttal evidence regarding the rate of
16 occurrence for this injury under her care. Plaintiff respectfully asks the Court to admit this evidence
17 for the narrow purpose of rebutting this defense.
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24 ² *State v. Perez-Valdez*, 172 Wash. 2d 808, 826, 265 P.3d 853, 862 (2011).
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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
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Dated this 31st day of May, 2022 at Seattle, Washington.

Jenine Michaelis