Honorable Judge James W. Lawler
Hearing on June 1, 2022, at @ 9:00AM
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 REPLY TO HER MOTIONS *IN LIMINE*

2. Dr. Freeman should be excluded because his testimony is misleading and unhelpful to the jury.

Plaintiffs' opposition to this motion is a straw man. Dr. Freeman is the ***only*** expert in this case who will not offer an opinion on standard of care, proximate causation, or damages. Plaintiffs acknowledge that Dr. Freeman's sole purpose is to impeach defense experts' credibility. Yet, Plaintiffs cite no case law endorsing such an attenuated expert role. Dr. Freeman is the personification of extrinsic impeachment evidence, which is universally disfavored because it is misleading/confusing and distracts from the substantive issues. *See* ER 608(b); ER 613(b); Tegland, § 613.10 Extrinsic evidence of prior inconsistent statement—Generally, 5A Wash. Prac., Evidence Law and Practice § 613.10 (6th ed.) (extrinsic evidence of prior inconsistent statement under ER 613 is "normally" excluded because "[t]he additional extrinsic evidence would waste time and would be of little additional value.")

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Dr. Freeman may be critical of defense experts' reliance on the literature, but he cannot link those criticism up to the actual substance of the case. He readily admits that he cannot say, more probably than not, that either parties' theory is correct. (*See* Rand Decl. [5/19/2022] Ex. G at 91:7-21). He will not testify that "something was or was not the proximate cause of [Z.H.]'s injury." (*Id.* at 125:10-13.) Indeed, he even agrees that, at least theoretically, the natural forces of labor can cause permanent brachial plexus injuries. (*Id.* at 122:17-23.) His opinions are nothing more than freestanding criticisms and generalized statements about population risk, which will do nothing but mislead and confuse the jury. ER 702, 403.

Epidemiology may be relevant in some cases where liability and causation turn on population data. But it is not relevant in medical negligence cases like this where, under RCW 7.70.40, Plaintiffs have the burden of proving a *specific* violation of the standard of care that was the *specific* proximate cause of the injury alleged. *See e.g. Reyes v. Yakima Health Dist.*, 191 Wn.2d 79, 86-88, 419 P.3d 819, 823 (2018). It was for this **exact reason** that Dr. Freeman's opinion were excluded by the Indiana Court of appeals in *Tucker v. Harrison*, 973 N.E.2d 46, 50-51 (2012). In the *Tucker* Court's words:

> [A]llowing Dr. Freeman to testify it was ninety-nine percent more likely that the surgery caused ovarian failure than it was coincidence is not relevant to nor would it assist the jury in making the determination of Dr. Harrison's performance of the bilateral cystectomy caused Tucker's ovarian failure, and it runs the substantial risk of misleading the jury.

Id. at 52. *Tucker* is completely on point. Plaintiffs have not even attempted to distinguish *Tucker* because they know that they cannot. For that matter, Plaintiffs do not cite to a single case or Rule in their Response to this motion, which is, itself, telling about the lack of legal merit for their position.

Moreover, Dr. Freeman's methodology is unreliable. Dr. Freeman was strategically not provided any of the testimony or literature for Plaintiffs' medical experts and thus conveniently cannot comment on whether their reliance on the literature is appropriate or

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flawed. (*See* Rand Decl. [5/19/2022] Ex. G. at 52-53.) This is similar to *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 918, 296 P.3d 860, 864 (2013), where our Supreme Court affirmed the exclusion of an epidemiology expert who had deliberately ignored relevant data and evidence thereby "create[ing] the appearance that he attempted to reach a desired result, rather than allowing the evidence to dictate his conclusions." Indeed, it is even worse in this case because Dr. Freeman does not even have any conclusions to offer. Other Courts around the Country have grappled with Dr. Freeman's testimony and questionable methodology, including the Western District of Washington. *See Hausman v. Holland Am. Line-USA*, No. 13CV00937 BJR, 2015 WL 9839747, at *2 (W.D. Wash. Aug. 21, 2015) (denying motion to exclude Dr. Freeman under ER 403 for "credibility issues", but recognizing that "[c]learly, other courts have had issues with accepting Dr. Freeman's expert testimony in the past.")

In their Response, Plaintiffs' counsel repeatedly refers to the literature relied on by defense experts as "epidemiological studies." Yet, all these studies (including those relied on by Plaintiffs' own experts) were created by obstetricians, neurologists, and engineers—not epidemiologists—and were published in peer-reviewed journals for obstetrics, biomedical engineering, and neurology—not epidemiology. Plaintiffs' position appears to be that Dr. Freeman is an expert in any field that involves a study containing scientific data. That is simply not so. There is a reason that the parties have collectively retained **eight (8)** experts in the field of obstetrics, neurology, and engineering (five of which are for the Plaintiffs) to opine on standard of care and proximate causation in this birth injury case. Dr. Freeman stands alone as the only epidemiologist.

Additionally, Plaintiffs' characterization of Dr. Freeman's supposed opinions is at odds with his actual testimony. For example, they claim that "Dr Freeman's analysis shows the defense theory of causation for what it really is—merely a theory."[1] Yet Dr. Freeman expressly testified that Plaintiffs' theory of proximate causation is also "just a theory":

[1] (Pl.'s Resp. at 7:14.)

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> 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 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.
>
> I'm not weighing in on that one. …

(*See* Rand Decl. [5/19/2022] Ex. G at 91:7-21.) Plaintiffs go on to claim that "It has never been proven that the natural forces of labor have caused even one four-level avulsion injury."[2] The studies do not prove that is even possible, and the jury should know that." But Dr. Freeman expressly testified to the contrary:

> Q. And your opinion basically is the natural forces of labor can cause brachial plexus injuries. Correct?
>
> A. That is correct.
>
> Q. And natural forces of labor can cause permanent brachial plexus injuries. Correct?
>
> A. **That's at least potentially true, yes.**

(*Id.* at 122:17-23) (emphasis added.) It is ironic that Plaintiffs' counsel claims that the defense is "mispresenting" Dr. Freeman's testimony when they are the ones doing so. Regardless, the Court has Dr. Freeman's entire deposition transcript before it and can judge for itself on this issue.

Finally, Plaintiffs' counsel launches *ad hominem* attacks against defense counsel—a predictable strategy when a party's position is devoid of merit, like theirs is here. The defense will take the high road on this one. Plaintiffs have not cited a **single case** to rebut the authority presented by defense counsel supporting the exclusion of Dr. Freeman's testimony (in fact, Plaintiffs do not site a single case, Evidence Rule, or statute in their entire opposition to this particular motion). And, as demonstrated above, their characterization of Dr. Freeman's testimony is contrary to its actual substance. Dr. Freeman's testimony is not

[2] (Pl.'s Resp at 7:15.)

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relevant, will not help the jury, and is highly misleading and confusing. ER 402, ER 403, ER 702. The Court should exercise its critical gatekeeping function and exclude Dr. Freeman from testifying at trial.

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

Under *Burnet v. Spokane Ambulance*, 131 Wn. 2d 484, 494, 933 P.2d 1036 (1997), the Court may exclude late disclosed witnesses upon findings that (1) the discovery violation was willful or deliberate, (2) the violation substantially prejudiced the moving party's ability to prepare for trial, and (3) that a lesser sanction will not suffice. These factors are all satisfied here.

Plaintiffs have known about Ms. Ulmer and Ms. Smith since at least Laura Hamilton's deposition in the prior lawsuit on June 27, 2019. (*See* Rand Decl. [5/19/2022] Ex. V.) Yet, Plaintiffs never disclosed them as witnesses that they would call in their case in chief in discovery or in either their Primary or Rebuttal Witness disclosure. Defendant Hamilton included them in her rebuttal witness disclosure, but Plaintiffs' counsel **objected**, so Defendant Hamilton withdrew them. Plaintiffs' counsel conveniently ignores the fact that they objected and were planning to file a motion to exclude these witnesses in their Response, but it is clearly documented in email correspondence included in defense materials. (*See* Rand Decl. [5/19/2020] Ex. U.) It is ironic and hypocritical that *now*, after the discovery cutoff has passed and barely a month before trial, Plaintiffs decide they want to call Ms. Ulmer and Ms. Smith in their case in chief. A discovery violation is willful if the violating party lacks a "reasonable excuse." *Allied Fin. Servs., Inc. v. Mangum*, 72 Wn. App. 164, 168, 864 P.2d 1, 3 (1993), *amended*, 72 Wn. App. 164, 871 P.2d 1075 (1994). There is no reasonable excuse for the untimely disclosure here as Plaintiffs' counsel have known about these witnesses for years. Moreover, Plaintiffs' counsel **objected** to Defendant Hamilton's timely disclosure of these witnesses. The inconsistency of their position now further demonstrates the willfulness of their conduct. Plaintiffs objected to these witnesses

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being called to testify. They should be held to their objection, particularly as trial is less than twenty days away.

The second *Burnet* factor is also satisfied. The untimely disclosure and Plaintiffs' inconsistent conduct has substantially prejudiced Defendant Hamilton's trial preparation. Defendant Hamilton only intended to call these witnesses in a narrow rebuttal role[3] to address certain claims made by Plaintiffs' experts. Defendant Hamilton withdrew these witnesses after Plaintiffs' counsel objected. As a result, there has been no discovery surrounding what, if any, relevant personal knowledge they may have which could be elicited in Plaintiffs' case in chief. The discovery cutoff has passed, and trial will begin 19 days after this motion is heard. There is no time to schedule and complete the depositions of these witnesses, obtain their transcripts, and, if necessary, send those transcripts to experts for consideration. The parties need to be preparing for trial at this point, not conducting further discovery of non-critical fact witnesses. Plaintiffs' position is that the deadlines in the Scheduling Order that they expressly agreed to are meaningless and need not be complied with. Such a position is untenable and contrary to the very purpose a scheduling order serves. *Lancaster v. Perry*, 127 Wn. App. 826, 833, 113 P.3d 1, 3–4 (2005) ("The purpose of the case management schedule and disclosure deadlines is to have an orderly process by which a case can proceed. Requiring parties to disclose witnesses allows the opposing party time to prepare for trial and conduct the necessary discovery in a timely fashion.")

Third, no lesser sanction will suffice. Again, we are on the threshold of trial, which has already been substantially delayed by Plaintiffs' conduct and voluntary dismissal back in July of 2019. Ms. Ulmer and Ms. Smith should be excluded.

The *Burnet* factors are also satisfied with respect to Ms. Lamb for the same reasons. But exclusion is also necessary because Plaintiffs only intend to call Ms. Lamb to offer

[3] Hence why these witnesses were disclosed in Defendant's Disclosure of Possible Rebuttal/Alternate Witnesses. (*See* Rand Decl. [5/19/2022] Ex. I at 22-23.)

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improper character evidence about Laura Hamilton under ER 404(a) and (b).[4] Plaintiffs' counsel fully admits this in their brief but claims that her testimony will be admissible because Defendant Hamilton "will likely" open the door to Laura Hamilton's character. This is false. Plaintiffs' counsel's selective reliance on Ms. Amondson-Muller's deposition testimony is a deliberate (and, frankly, astounding) attempt to mislead this Court. Indeed, Plaintiffs' counsel specifically excluded all of defense counsel's objections to Mr. Neff's line of questioning about Laura Hamilton's character, which make it abundantly clear that defense counsel will not be eliciting any such testimony from this or any witness at trial. This is what the transcript says without Plaintiffs' counsel's edits:

> Q. Do you plan to testify that Laura Hamilton was a good midwife at trial?
>
> A. Yes, I believe so.
>
> Q. And do you plan to testify about that at trial?
>
> MS. MONIZ: She's not going to be asked that questions at trial.
>
> Q. (BY MR. NEFF) You can answer the questions, Ms. Amondson-Muller.
>
> MS. MONIZ: You may answer.
>
> A. Would you ask the question again?
>
> Q. (BY MR. NEFF) Do you plan to testify at trial that Laura Hamilton was a good midwife?
>
> MS. MONIZ: I'm going to object to the form. I said she wasn't going to testify about that. That's not an issue in the case. The issue is whether she acted within the standard of care in this case. You may answer.
>
> A. Well, I believe that Laura Hamilton is a good midwife.
>
> Q. (BY MR. NEFF) And do you plan to make that part of your testimony at trial?
>
> MS. MONIZ: Same objection. It's not up to her what her testimony is about. It's what she's asked and what are the issues in the case.
>
> MR. NEFF: Only Ms. Amondson-Muller can control what she says on the witness stand, Donna.

[4] Moreover, Plaintiffs' counsel fully admits that they spoke to Ms. Lamb before the discovery cutoff of May 6th but did not disclose her until May 17th. This delay further demonstrates the willfulness for their discovery violation.

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MS. MONIZ: Yeah. Same objection. You may answer.

A. We're back to: Now what's the question? I've not done this before, so repeat it one more time.

Q. (BY MR. NEFF) Sure. Do you plan to testify at trial that Laura Hamilton was a good midwife?

MS. MONIZ: Same objections.

A. I believe that Laura Hamilton was a good midwife.

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

MS. MONIZ: Same objections.

A. If I were asked that questions, I would say yes, she was a good midwife.

Q. (BY MR. NEFF) Do you plan to testify that Laura Hamilton provided safe care to patients in the past, before she became involved with Seng Hamilton and Zachary Hamilton?

MS. MONIZ: Same objections. You may answer, if you're able to.

A. I have never seen anything to the contrary of that.

Q. (BY MR. NEFF) And do you plan to testify about that at trial?

MS. MONIZ: Same objections.

A. To be truthful with you, I don't know exactly if I will be asked that question or not.

Q. (BY MR. NEFF) Do you plan to testify that Laura Hamilton successfully delivered babies in the past, before becoming involved with Seng and Zachary Hamilton?

Ms. Moniz: Same objections.

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

(*See* Rand Decl. [5/19/2022] Ex. E at 34:11-37:1.) As reflected above, Defendant Hamilton has **no intent whatsoever** of eliciting improper character evidence about Laura Hamilton. Indeed, Mr. Neff's instance on continuing with this line of questioning over defense counsel's objection shows, unambiguously, that it is Plaintiffs' counsel who want to improperly inject Laura Hamilton's character into this trial. They know that their case cannot stand on the merits alone, so they want an excuse to introduce impermissible character evidence under RE 404(a) and (b) to prejudice Defendant Hamilton in the eyes of the jury.

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This intent is so obvious that Defendant Hamilton even moved *in imine* to prevent Plaintiffs' counsel from trying to open the door themselves during cross examination. *See* Def. MIL No. 7. Plaintiffs' disclosure of Ms. Lamb was gravely untimely under *Burnet*, and her purported testimony is plainly irrelevant, inadmissible, and prejudicial. She must be excluded from testifying at trial.

Finally, per the parties' stipulation, Plaintiffs have agreed to withdraw their untimely disclosed theology expert Geraldine O'Mahony, PhD. Defendant Hamilton maintains that it was improper, offensive, and reprehensible for Plaintiffs' counsel to compare defense counsel to "dictators and political leaders in third-world countries."[5] However, Defendant Hamilton withdraws her request for terms as the issue surrounding Dr. O'Mahony is now moot.

For all these reasons, the Court should grant this motion *in limine* and exclude the untimely disclosed witnesses in Plaintiffs' May 17th "amended" witness disclosure.

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

Plaintiffs concede that Z.H.'s parents and family members do not have any claim of damages for pain and suffering and that any evidence or testimony about their personal pain suffering and hardship is irrelevant. Nonetheless, Plaintiffs' claim that they should still be permitted to elicit irrelevant and prejudicial testimony from the parents and family members about their own "pain, suffering, and personal hardship" under the doctrine of *res gestae*. This is false.

The doctrine of *res gestae* applies generally in the criminal context as an exception to ER 404(b) to allow evidence of other "misconduct that is close in time to the crime presently charged and directly relevant to proving the crime presently charged." Tegland § 404.18 Admissibility on issues other than character—Inseparable part of crime charged (*res gestae*), 5 Wash. Prac., Evidence Law and Practice § 404.18 (6th ed.); *State v. Dillon*, 12

[5] (*See* Rand Decl. [5/19/2022] Ex. T.)

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Wn. App. 2d 133, 148, 456 P.3d 1199, 1207, *review denied*, 195 Wn.2d 1022, 464 P.3d 198 (2020). The rationale behind the doctrine is that "[a] defendant cannot insulate himself by committing a string of connected offenses and then argue that the evidence of the other uncharged crimes is inadmissible because it shows the defendant's bad character, thus forcing the State to present a fragmented version of the events." *State v. Lillard*, 122 Wn. App. 422, 431, 93 P.3d 969, 974 (2004).

Plaintiffs' do not cite a single case applying *res gestae* in the manner they propose. Indeed, testimony from the family members about their own alleged hardship lacks the requisite temporal proximity to the alleged negligence and does not even implicate ER 404's exclusionary rule (i.e. this is not evidence of Defendant Hamilton's bad character or other "bad acts"). The doctrine cannot be used to bootstrap inadmissible and irrelevant matters into evidence. Tegland, 5 Wash. Prac., Evidence Law and Practice § 404.18 (6th ed.) ("As always, the evidence is subject to the overriding requirement of general relevance. To state the obvious, evidence of conduct that is close in time to the crime charged is not admissible on a *res gestae* theory if it is not relevant to prove the crime charged.") The alleged pain, suffering, and hardship of Z.H.'s family members are completely irrelevant to Z.H.'s damages. ER 402. Permitting such testimony would be massively prejudicial as the only reason such evidence would be offered would be to elicit sympathy toward the Plaintiffs. ER 403. Such evidence would also be immensely confusing and misleading because it would encourage the jury to consider the family members' alleged pain and suffering in awarding damages even though they do not have any compensable claim for damages under Washington law.

This is *exactly* the sort of matter that requires an Order *in limine* because it would prejudice defense counsel in the eyes of the jury if they were forced to object to emotionally charged but irrelevant testimony from the family members about their own alleged hardship. *See Douglas v. Freeman*, 117 Wn.2d 242, 255, 814 P.2d 1160, 1167 (1991) (motion *in limine* should be granted when evidence is clearly inadmissible and "the moving party should be

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spared the necessity of calling attention to it by objecting when it is offered during the trial.") Accordingly, Defendant Hamilton requests that this motion be granted.

5. Evidence regarding the defendant's history of prior medical malpractice lawsuit and/or department of health proceedings must be excluded.

This issue has now been thoroughly briefed in Defendant Hamilton's motions *in limine* and in response to Plaintiffs' Motion to Admit Evidence of Other Permanent Brachial Plexus injuries. All that briefing is incorporated by reference.

Evidence of other "bad outcomes," lawsuits, and DOH matters is classic character evidence that is inadmissible under ER 404(b). The only reason that Plaintiffs want to inject these matters into the trial is to create the impermissible inference that Laura Hamilton must have been negligent in this case because of her prior "bad outcomes," lawsuits, and DOH matters. *See e.g. Hammel v. Rife*, 37 Wn. App. 577, 585, 682 P.2d 949, 954 (1984).

Contrary to Plaintiffs' claim, evidence about Laura Hamilton's experience and background as a midwife is not character evidence under ER 404. This evidence provides a necessary foundation for her testimony (from her deposition) as a midwife. After all, Laura Hamilton is judged under the standard of care by what a reasonably prudent midwife would have done in this situation. RCW 7.70.040(1)(a). Evidence that Laura Hamilton practiced as a midwife for 30+ years is foundational and not equivalent to saying that Laura Hamilton has a "good reputation in the community," "delivered X number of babies without injury during her 30+ year career," or anything similar, which would cross the line into character evidence under ER 404. Moreover, Plaintiffs have made it clear that they intend to claim that Laura Hamilton did not know what she was doing and did not know how to handle a shoulder dystocia. Evidence about Laura Hamilton's training, education, and experience is necessary to rebut these allegations.

Plaintiffs specifically claim that Laura Hamilton's certificates of continuing education and certificates of membership with the Midwives Association of Washington State constitutes character evidence. Defendant Hamilton disagrees. None of the case law

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Plaintiffs cite supports this assertion. Nor does any of the case law support Plaintiffs erroneous assertion that Defendant Hamilton can "open the door" to inadmissible evidence before the trial has even begun. Furthermore, it should also be reiterated that the Court granted this same motion *in limine* in *Myhre*. Plaintiffs' counsel has not provided any explanation or authority why a different outcome is warranted in this case. (*See* Rand Decl. [5/19/2022] Ex. L.)

Notwithstanding, as the Court can likely surmise by this point, Plaintiffs are desperate to introduce impermissible character evidence regarding Laura Hamilton's prior DOH matters, lawsuits, and "bad acts." Defense counsel has no intention of making Laura Hamilton's character an issue in this lawsuit, but it is clear that Plaintiffs' counsel will be looking for every opportunity—no matter how tenuous—to claim that the "door has been opened" to this evidence. To avoid numerous sidebars and to ensure that inadmissible character evidence remains inadmissible, Defense Counsel requests that the Court provide guidance on the parameters of permissible testimony and evidence in this area that the defense may present at trial. Doing so will promote an expedient and orderly trial and ensure that the jury renders its verdict based on the merits and the merits alone.

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

Again, this issue has been thoroughly addressed by this point and Defendant Hamilton incorporates by reference all prior defense briefing on this issue.

Evidence of Levi Myhre's prior brachial plexus injury is classic character evidence. ER 404(b). Plaintiffs cannot even conceal that they are trying to introduce this evidence to support an improper character inference as they claim that evidence of Levi's Myhre' prior injury and related DOH matters "support the conclusion that defendant Hamilton did not act skillfully or safely."[6] An author of a law school textbook would be hard-pressed to craft a more illustrative example of inadmissible character evidence than this.

[6] (*See* Pl.'s Resp. at 17:3.)

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Plaintiffs' argument that the natural forces of labor theory "opens the door" to impermissible character evidence about Laura Hamilton makes no sense at all. The natural forces of labor theory is a valid and scientifically recognized explanation for the cause of Z.H.'s injury. *L.M. by & through Dussault v. Hamilton*, 193 Wn.2d 113, 436 P.3d 803 (2019). Defense experts have linked up that theory to the specific facts of this case to support their opinions on causation. Plaintiffs fail to explain how this "opens the door" to impermissible character evidence about prior bad outcomes, litigation, and DOH matters. They are grasping at straws in this respect.

Plaintiffs claim that Dr. DeMott "opened the door" to such evidence during his deposition also fails. In the excerpt of his deposition that Plaintiffs' quote, Dr. DeMott makes clear that his opinion are based on the customary practice and training of obstetricians and midwifes, as well as Laura Hamilton's **own testimony**. Such opinions do not "open the door" to character evidence. *See* ER 406 (evidence of a person's habit and practice admissible). Moreover, this testimony was offered during a discovery deposition in response to questions presented by Plaintiffs' counsel. Plaintiffs cite no case law holding that testimony offered outside the presence of a jury can "open the door," nor does this even make sense.

Again, it must be reiterated that the Court granted this same motion *in limine* in *Myhre*. Plaintiffs' counsel has not provided any explanation or authority why a different outcome is warranted in this case. (*See* Rand Decl. [5/19/2022] Ex. L.) Indeed, excluding this evidence is even more necessary here because the jury found that Laura Hamilton was not negligent and not at fault for Levi Myhre's injury. It would be manifestly improper and prejudicial for Plaintiffs to now be allowed to use that injury to support their claims of negligence in this case.

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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.

Plaintiffs' do not substantively oppose this motion. As discussed above, Plaintiffs' counsel deliberately elicited improper character evidence from Ms. Amondson-Muller during her deposition over counsel's objection. They should be prevented from doing so at trial in their questioning of **any witness** as part of a strategy to "open the door" themselves to inadmissible character evidence or force defense counsel to raise a prejudicial objection in the presence of the jury. This motion should be granted.

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.

Plaintiffs do not appear to oppose this motion. The law is clear that in medical negligence cases the plaintiff must prove that the defendant violated the standard of care, and that this violation proximately caused the injury complained of.[7] Plaintiffs have many criticisms of Laura Hamilton's care. But for a criticism to be relevant and admissible, Plaintiffs must produce qualified expert testimony that the criticism violated that standard of care ***and*** proximately caused the injury complained of. Any criticism that does not link up through expert testimony to both standard of care and proximate causation is irrelevant and inadmissible. ER 402. It would also be confusing and misleading to the jury. ER 403. For example, Plaintiffs' counsel questioned Laura Hamilton about removing Seng Hamilton's IUD without making a note of that in her records. This should be excluded because no expert has testified that this was a proximate cause Z.H.'s injury. There are also criticisms of the prenatal care that are not related to the shoulder dystocia or brachial plexus injury. These should be excluded as well. ER 402, 403.

[7] RCW 7.70.040; *see also*, *Swanson v. Brigham*, 18 Wn. App. 647, 651, 571 P.2d 217 (1977); *Reese v. Stroh*, 128 Wn.2d 300, 308, 907 P.2d 281 (1995) ("Medical malpractice cases are a prime example of cases where [expert] testimony is needed"); *Douglas v. Freeman*, 117 Wn.2d 242, 249, 814 P.2d 1160 (1991) ("the standard of care must [usually] be established by expert testimony"); *McLaughlin v. Cooke*, 112 Wn.2d 829, 836, 774 P.2d 1171 (1989) (discussing the necessity for expert testimony in medical malpractice cases).

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

It is undisputed that there is no evidence that Seng Hamilton had gestational diabetes in any of her three viable pregnancies prior to Z.H. It is undisputed that all defense experts agree that Seng Hamilton, more probably than not, did not have gestational diabetes during her pregnancy of Z.H. since two glucose tests taken during the pregnancy were within the normal range. Plaintiffs' obstetrics experts believe that Laura Hamilton should have done additional glucose testing, but it is undisputed that they all agree it cannot be said, more probably than not, that Seng Hamilton had gestational diabetes during Z.H.'s pregnancy. (*See* Rand Decl. [5/19/2022] Ex. M; N.)

Only Plaintiffs' midwife expert, Ms. Wilkinson, believes, more probably than not, that Seng Hamilton had gestational diabetes during Z.H.'s pregnancy. However, her opinion in this respect is based on facts that do not exist. She testified:

> Q. Do you have an opinion on a more-likely-than-not basis whether Ms. Hamilton had gestational diabetes during her pregnancy with Zach?
>
> A. Yes. Just what I said, actually. I think it's more than likely that she did have gestational diabetes – **based on her *postpartum* checks that she was diabetic. And, of course, gestational diabetes often continues *postpartum*, now, into – not just pregnancy life.**

(*See* Rand Decl. [5/19/2022] Ex. O at 34:6-14) (emphasis added). There is *no evidence* in this case whatsoever that Seng Hamilton was found to have gestational diabetes during any "postpartum" checkup after Z.H.'s birth. The evidence shows that Seng Hamilton developed gestational diabetes during an entirely separate pregnancy almost two years after Z.H.'s birth, but there is no evidence that Seng Hamilton had any form of diabetes prior to that.

During oral argument on June 1st, the Court should ask Plaintiffs' counsel if there is any record or evidence showing that Seng Hamilton had gestational diabetes during a postpartum check after Z.H. was born—they will have to say no.

The fact that Seng Hamilton developed gestational diabetes during a subsequent pregnancy does not prove that she must also have had gestational diabetes during her

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pregnancy with Z.H. two years prior, just as it does not prove that she had gestational diabetes during any of her other three prior pregnancies. The logic there does not follow.[8] No expert has said to the contrary. Not even Ms. Wilkinson has done so as her opinion is based on the erroneous belief that Seng Hamilton had diabetes during her "postpartum checks" after Z.H.'s birth.

Plaintiffs' bald assertion that "[r]elevance is the lowest evidentiary threshold in the courtroom" contains no citation and shows that Plaintiffs' counsel knows their position is weak on this point.[9] The Plaintiffs should not be allowed to ask the jury to speculate that Seng Hamilton had undiagnosed gestational diabetes during her pregnancy with Z.H. because she was diagnosed with gestational diabetes during an entirely separate pregnancy two years later. Likewise, the Court should not allow Ms. Wilkinson to testify that Seng Hamilton had gestational diabetes based on "postpartum" checkups after Z.H.'s birth when there is **no evidence to support this** in the records or otherwise. *See Seybold v. Neu*, 105 Wn. App. 666, 677, 19 P.3d 1068, 1074 (2001) ("expert testimony must be based on facts in the case, not speculation or conjecture.") Such testimony has no foundation in fact and would only serve to mislead and confuse the jury and would be immensely prejudicial to the defense. ER 702, ER 403. Accordingly, Defendant Hamilton requests that this motion be granted

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

Plaintiffs' argument here misses the point. It is one thing for Plaintiffs' counsel to elicit testimony from an expert that one of the reasons the standard of care exists is to

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[8] By analogy, *see e.g. O'Dell v. Chicago, M., St. P. & P. R. Co.*, 6 Wn. App. 817, 828, 496 P.2d 519, 526 (1972) (evidence of a subsequent accident at an intersection inadmissible to prove prior dangerous condition where evidence insufficient to establish "similarity of conditions."); *Breimon v. Gen. Motors Corp.*, 8 Wn. App. 747, 754–55, 509 P.2d 398, 404 (1973) ("Evidence of a previous similar accident involving a party generally is inadmissible to show a lack of care by the same party as the cause of the accident is question. Such evidence is irrelevant concerning the cause of the instant accident since innumerable factors and causes present in the situation may not have been present previously and vice versa.")

[9] Plaintiffs' counsel further claims that "Defendant Hamilton also cites the wrong standard for admission of this testimony ..." but then, for whatever reason, declines to explain what they believe the correct standard is with appropriate citations to authority. Such bald and conclusory arguments should be disregarded.

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promote patient safety. But it is another thing entirely for Plaintiffs counsel to use some variation of the term "safe" over 30 times in his questioning of Defendant Hamilton's two expert midwives, as Mr. Neff did in this case. (*See* Rand Decl. [5/19/2022] Ex. D, Ex. Q.) At some point, it becomes painfully obvious that this is a tactic, and that Plaintiffs' counsel is attempting to redefine the standard of care by suggesting to the jury that they have the power to improve the safety of themselves, their family members, and their community by rendering a verdict that will "send a message" and/or lead to the reduction of "dangerous" or "unsafe" conduct.

This would be immensely prejudicial and misleading/confusing. ER 403. Childbirth is not an inherently "safe" thing; complications still happen even when the standard of care is met. *Watson v. Hockett*, 107 Wn.2d 158, 164, 727 P.2d 669, 673 (1986) ("A poor medical result is not, in itself, evidence of any wrongdoing by the doctor.") "Reptile" tactics like what Mr. Neff exhibited also cross the line into impermissible "Golden Rule" and punitive damages arguments, which both parties agree are improper.

Plaintiffs' argument that "granting this motion would cripple plaintiffs' ability to cross examine [defense experts]" defies credibility. Plaintiffs' counsel is certainly able to cross exam defense experts about their opinions regarding the applicable standard of care—that is, after all, the governing legal standard under Washington law, not some nebulous "safety" standard.

This is not a speculative motion. Plaintiffs' counsel (particularly Mr. Neff) clearly demonstrated his intent to employ the reptile theory during the depositions of defense experts. Examples of such questions are quoted in Defendant Hamilton's motion with citations to the record. Now, Defendant Hamilton understands that this may be a difficult motion to grant *in limine* as counsel is entitled to some degree of latitude in how they frame their questions and arguments. However, it would be appropriate at this stage for the Court to caution the parties that there are limits to this latitude and that if it becomes apparent that

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Plaintiffs' counsel is trying to mislead the jury about the applicable legal standard, an objection may be made resulting in appropriate remedial action.

15. No claim or evidence concerning lost earning capacity of Z.H.

There is no dispute that Plaintiffs are not advancing any claim for lost earning capacity. Plaintiffs' life care planning expert, Cloie Johnson, made this clear during her deposition. This motion does not seek to exclude Ms. Johnson's opinion that the defense (for some irrational reason) should have to pay for Z.H.'s college, so Plaintiffs' concerns on that point are without merit.

However, Plaintiffs suggestion that they should be permitted to present testimony from their neurology expert, Dr. Label, that Z.H.'s disability "presents obstacles in obtaining and keeping employment" is clearly an improper attempt at advancing a lost earning capacity claim under the guise of general damages. Moreover, putting aside the speculative nature of such an argument, Dr. Label did not offer any such opinion during his deposition:

> Q. Okay. Do you have an opinion on how the damage to Zachary's right upper extremity will affect his employment, or is that something that's outside of your expertise?
>
> A. Well, again, I'm not a life plan person, but many of these things are obvious. So many things that we do requires two arms; typing, carrying things, you know, many things that require two arms. So any employment that requires two arms, like I said, maybe video work, photography, you have to carry something, anything that's going to require two arms is going to be limiting him.
>
> Doesn't mean that there aren't things he can't do, but – and I can't think of every single employment that requires two arms, but this day and age, most things require typing skills, you know, carrying things. So those are some of the – the limits.

(*See* 2nd Supp. Rand Decl. Ex. A at 44:21-45:12.)

Dr. Label's testimony is that Z.H.'s physical limitations may affect the types of jobs he is able to have; it is not that Z.H. will have a difficult time "obtaining and keeping employment." Any attempt by Plaintiffs to have Dr. Label modify his testimony now to offer

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this new opinion is severely untimely, improper, and must be excluded. Moreover, Plaintiffs claim that Z.H. will suffer discrimination in employment is complete speculation. Any such argument should also be excluded under ER 403 for as it is immensely prejudicial and intended to only to elicit sympathy.

The bottom line is that Plaintiffs chose not to advance a claim for lost earning capacity. This is likely because there is no evidence to support such a claim; even their own vocational expert agrees that Z.H. will likely obtain at least a bachelor's degree like his parents. Whatever the reason, Plaintiffs must be held to their decision. This motion should be granted.

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

Seng Hamilton is not a party. Nor is she Z.H.'s guardian for the purposes of this lawsuit. Plaintiffs fail to cite any authority or even explain why a special exception should be made for her. However, if the Court is inclined to allow her to attend trial, she should be required to testify first, so that her testimony, as a fact witness, will not be tainted. *State v. Skuza*, 156 Wn. App. 886, 896, 235 P.3d 842, 847 (2010), *as amended* (July 20, 2010). Moreover, she should be excluded from sitting at counsel's table as she is not a party. Allowing her to sit at counsel table with Scott Hamilton would be nothing more than an attempt to gain favor with the jury and present the appearance of a strong family unit, which is not entirely accurate. If allowed, this would "open the door" to Seng and Scott Hamilton's marital difficulties, which Plaintiffs moved *in limine* to exclude.

With respect to expert witnesses, Defendant Hamilton believes that they should not be excluded. The concerns supporting sequestering of witnesses (i.e. inconsistencies, fabrication, and collusion)[10] simply are not at issue with experts who are necessarily basing their opinions, in part, on the testimony of fact witnesses and other experts. For this reason, federal courts have allowed experts to attend trial proceedings and review transcripts of trial

[10] *State v. Skuza*, 156 Wn. App. 886, 896, 235 P.3d 842 (2010).

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testimony. *See e.g. Morvant v. Construction Aggregates Corp.*, 570 F.2d 626, 629-630 (6th Cir. 1978) (there is "little, if any, reason for sequestering a witness who is to testify in an expert capacity only and not to the facts of the case.") This motion should be granted accordingly.

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

Plaintiffs solely bear the burden of proof. Their experts must opine on the standard of care and proximate causation, and defense experts must respond. RCW 7.70.040. That is why the plaintiff goes first and last, and the defendant goes second at trial. Plaintiffs' counsel knows this, so it is truly perplexing that they continue to complain that this standard procedure is somehow unfair.

In any event, Plaintiffs' counsel does not cite any case law that supports their position or their claim that experts should not be allowed to review transcripts of trial testimony. Permitting this is plainly consistent with ER 703, which authorizes experts to rely on data, factual background, and testimony from other witnesses and experts in formulating their opinions. ER 704; *Cornejo v. State*, 57 Wn. App. 314, 317, 788 P.2d 554 (1990). And as stated immediately above, the concerns underlying the exclusionary rule in ER 615 are simply not implicated by expert witnesses who will not testify to the facts of the case. *See Morvant,* 570 F.2d at 629-630. Plaintiffs' assertion that this is not a "complex" medical negligence case defies credibility and is undermined by the fact that Plaintiffs have disclosed **9 experts** to testify for them at trial. If this case is so simple, then why do Plaintiffs need so many experts, including multiple experts in the same and overlapping disciplines? Plaintiffs' counsel's position here is incompatible with their opposition to Defendant Hamilton's motion *in limine* to limit the parties to one expert per discipline—they cannot have it both ways. (*See* Def. MIL No. 27.)

Defense experts will need to respond to the testimony of Plaintiffs' experts within the scope of their qualifications. They should be allowed to review their trial testimony to

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effectively do so. Plaintiffs cite no authority supporting their position that this is unfair or improper. Their opposition is high on rhetoric but low on substance, and even lower on authority. Defendant Hamilton requests that this motion be granted.

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.

The parties appear to be in agreement except with respect to Ms. Smith and Ms. Ulmer.[11] Neither Ms. Smith nor Ms. Ulmer are parties to this lawsuit, so their statements (if any) are not admissions by a party opponent under ER 801(d)(2). Nor is there any evidence that either Ms. Smith or Ms. Ulmer qualify as a "speaking agent" for Ms. Hamilton. *See e.g. Passovoy v. Nordstrom, Inc.*, 52 Wn. App. 166, 170, 758 P.2d 524, 527 (1988); Tegalnd, § 801.48 Admissions by agents and employees—Who qualifies as a speaking agent, 5B Wash. Prac., Evidence Law and Practice § 801.48 (6th ed.). At best, this is a technical inquiry and Plaintiffs would need to identify the specific statement so that it could be evaluated to determine if the Rule has been met. They have not done so. Moreover, it should be noted that Defendant Hamilton has moved to exclude Ms. Ulmer and Ms. Smith for reasons stated above. *See* Def. MIL No. 3. If the Court grants that motion, then this issue is moot.

This motion should be granted without reservation.

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.

This motion is mostly agreed with some exceptions. The law is very clear that lay witnesses may only testimony to their observations; they may not give testimony about their opinions or perceptions of Z.H.'s state of mind or pain and suffering. ER 701; *Ashley v. Hall*, 138 Wn.2d 151, 156, 978 P.2d 1055, 1057 (1999); *Bitzan v. Parisi*, 88 Wn.2d 116, 121, 558 P.2d 775 (1977); *State v. Stumpf*, 64 Wn. App. 522, 526, 827 P.2d 294 (1992); Tegland, § 701.3 Lay opinion must be based upon personal knowledge, 5B Wash. Prac., Evidence Law and Practice § 701.3 (6th ed.). As an example, a lay witness in this case could testify that

[11] To the extent Plaintiffs intend to have witnesses testify to alleged communications with Laura Hamilton the defense reserves the right to object on other grounds. This will need to be handled on a case-by-case basis.

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they observed Z.H. struggle to brush his teeth, but they could not testify how they think that makes him "feel." Such testimony would be inherently speculative and inadmissible.

It is possible that Z.H. may have made statements to family members that would qualify as statements made about his then-existing state of mind under ER 803, but Plaintiffs' offer no example of such a statement or evidence that they believe satisfies the requirements of this rule. Moreover, such statements (if any) are outside the scope of this motion as a properly admitted statement under ER 803(a)(3) would not require a lay witness to offer a speculative opinion about Z.H.'s state of mind—that would need to be evident from the statement itself.

Z.H.'s parents should not be allowed to testify as to their opinion why Z.H. was treated for depression when he was five. They are not medical providers, did not diagnose Z.H., and are not qualified to offer this testimony without speculating.

Finally, this motion was granted in *Myhre*. (*See* Rand Decl. [5/19/2022] Ex. L.) There has been no change in the law that would support a different outcome here.

23. Any reference to Defendant Hamilton's liability insurance should be excluded.

Again, defense counsel has no intent on eliciting testimony from Ms. Amondson-Muller about Laura Hamilton's estate. Ms. Amondson-Muller's testimony on this subject during her deposition was all in response to questions asked by Plaintiffs' counsel over defense counsel's objection. It remains unclear why these questions were ever asked. This motion should be granted.

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.

ER 608(b) authorizes a party to impeach a witness by questioning him or her about prior specific instances of conduct that are probative of a character for truthfulness or untruthfulness. ER 608(b); *State v. O'Connor,* 155 Wn.2d 335, 349, 119 P.3d 806 (2005); *State v. York,* 28 Wn. App. 33, 36, 621 P.2d 784 (1980).

Here, the Washington State Bar Association found that Seng Hamilton had

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committed major ethics violations and suspended her for 21 months as a consequence. (*See* Rand Decl. [5/19/2022] Ex. S.) Pertinent here, the Disciplinary Authority found multiple instances where Seng Hamilton had over-drafted her client trust fund by thousands of dollars and that she "disbursed approximately $55,000 more to her law firm than was permitted by her fee agreements." (*Id.* at ¶22.) Both violations go to her character for truthfulness and untruthfulness as they are tantamount to theft, and Washington recognizes that theft is a *per se* dishonest act. *State v. Ray*, 116 Wn.2d 531, 545, 806 P.2d 1220, 1228 (1991), *abrogated on other grounds by State v. Crossguns*, 505 P.3d 529 (Wn. 2022). Indeed, Washington Courts have found that an attorney mismanaging client funds is comparable to embezzlement which is even more probative of untruthfulness because "'[u]nlike theft by taking, embezzlement involves **a violation of trust** and does not require proof of intent to permanently deprive the owner of the property taken.'" *Proceeding Against Schwimmer*, 153 Wn.2d at 760 (internal citations omitted) (emphasis added).

Seng Hamilton's violation for withholding funds that should have gone to her clients is, itself, probative of her character for untruthfulness under the case law just cited. But this is even more apparent considering that Seng Hamilton concealed this impropriety by not adequately disclosing these withholdings in settlement statements to her clients. (*See* Rand Decl. [5/19/2022] Ex. S at 4.) The Disciplinary Authority found that Seng Hamilton either "knew" or "should have known" that these violations were occurring.

Plaintiffs' attempt to downplay the severity of this misconduct is undermined by the fact that Seng Hamilton was prohibited from practicing law for almost **two years**. Her misconduct speaks to her character for truthfulness for reasons just explained as she violated her fiduciary duty of trust with her clients and then concealed this impropriety in her written disclosures. Plaintiffs make no argument that this misconduct was remote as the suspension was only lifted in approximately 2019.

Moreover, in exercising its discretion under ER 608(b), the Court should consider the witness's importance to the overall proceedings. *See e.g. York*, 28 Wn. App. at 36; *state*

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v. Clark, 143 Wn.2d 731, 766, 24 P.3d 1006, 1024 (2001). As the mother of Z.H., Seng Hamilton will be a crucial witness to this litigation. A major aspect of Plaintiffs' theory of liability involves Defendant's prenatal care. This theory will be based heavily on Seng Hamilton's testimony about her communications with Laura Hamilton. For example, it is anticipated that Seng Hamilton will testify that Laura Hamilton never offered or recommended that she receive further diagnostic screening/tests. Seng Hamilton also claims her uterus was only measured once despite contemporaneous midwifery records indicating otherwise. Of course, Laura Hamilton cannot take the stand to rebut this testimony because she is dead. The credibility of Seng Hamilton is of paramount importance in this case because the jury is only going to hear her side of the story through live testimony. Balancing the competing interests of the parties on this issue clearly weights in favor of admission for this reason alone. *See York*, 28 Wn. App. at 36 (abuse of discretion to exclude misconduct of "crucial" witness under ER 608(b) where his credibility was "the very essence of the defense.")

Accordingly, Defendant Hamilton requests that this motion be granted.

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

Plaintiffs do not disagree with this motion; they merely claim it is vague. Plaintiffs must prove by a preponderance of the evidence that the alleged failure to follow the applicable standard of care was a proximate cause of Z.H's damages. Here, the parties disclosed their respective experts and made these experts available for deposition. All of Plaintiffs' experts have been deposed and were asked for the totality of their opinions concerning liability. Plaintiffs should not be allowed to offer any theory or evidence of liability at trial that was not identified by experts at deposition. This principle is elucidated in *Kramer v. J. I. Case Manufacturing Co.*, 62 Wn. App. 544, 815 P.2d 798 (1991). In *Kramer*, the plaintiff asserted his alternate theories of liability just five or six days before the discovery cutoff. *Id.* at 552. The trial court granted the defendant's motion *in limine* to

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exclude these theories as untimely, and the Court of Appeals affirmed, finding that exclusion was appropriate because such untimely disclosure surprised defendant and did not permit ample time to obtain rebuttal witnesses. *Id.*

It should also be noted that Plaintiffs counsel's comment that granting this motion will "force countless sidebars and bench conferences" is concerning as it seems to suggest that Plaintiffs anticipate introducing "countless" new untimely expert opinions and theories of liability at trial that were never disclosed in discovery. Otherwise, this would not be a problem. Plaintiffs' counsel also argues that this motion is an attempt by the "defense to learn about plaintiff's trial strategy," which is an odd position to take because it suggests that Plaintiffs' "trial strategy" involves introducing new and previously undisclosed evidence and theories. Washington does not allow trial by ambush. *Jones v. City of Seattle*, 179 Wn.2d 322, 354, 314 P.3d 380, 396 (2013), *as corrected* (Feb. 5, 2014). This motion should be granted.

26. Evidence of collateral source benefits is admissible in a medical malpractice action, and under the facts of this case.

Documents reflecting the amounts *actually paid* for medical services (not just the amounts billed) should be submitted to the jury. Incomplete information would confuse the jury and will prejudice the defendant. ER 403. Documented proof indicates that the amount billed by a provider differs from the actual amount paid by insurers. All documentation showing only medical expenses/charges, without including the amounts actually paid, should be excluded as misleading. ER 403. The parties have in their possession documentation confirming the amount of past medical expenses that were actually paid for Z.H.'s care. It makes no sense and would be highly prejudicial to allow Plaintiffs' counsel to seek damages from the jury for past medical expenses in a different amount than was actually paid.

Plaintiffs cite no authority to support their argument that the defense should be precluded from identifying the source of payments for Z.H.'s medical expenses because

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much of his care was paid by Medicaid. Defendant Hamilton certainly does not intend to make this a point of emphasis, but Plaintiffs should not get to dictate how Defendant Hamilton presents her case on damages. Nor is this so substantially prejudicial that it requires exclusion under ER 403. Moreover, excluding this would create logistical complications admitting documentary evidence showing the amount that was actually paid for Z.H.'s medical care, which Defendant Hamilton is entitled to present under ER 7.70.080. This motion should be granted without exception.

27. The parties should be limited to one expert per discipline.

Plaintiffs' opposition to this motion fails. Limiting the parties to one expert per discipline is logical, fair, and will promote an efficient trial. Plaintiffs' position that their obstetrician experts will testify on different subject matter is not persuasive or even correct. Indeed, in their Response, Plaintiffs claim that Dr. Gurewitsch-Allen will testify regarding the "excessive force used by Laura Hamilton in delivering Z.H." But Plaintiffs also disclosed Dr. Sollers as testifying that "defendant Hamilton used excessive force in delivering Z.H." and this was consistent with his deposition testimony. (*See* Rand Decl. [5/19/2022] Ex. J at 7.) And Plaintiffs' third obstetrician expert, Dr. Stohl, was also disclosed as holding the opinion that "defendant used excessive force." (*Id.* at 5.) Contrary to Plaintiffs' claim, all three of their obstetrician experts, apparently, hold this opinion.[12] Moreover, Dr. Gurewitsch-Allen's opinion regarding "excessive force" is also a primary focus of Plaintiffs' biomechanical engineering expert, Dr. Robert Allen (Dr. Gurewitsch-Allen's husband). This is confirmed in the briefing on Defendant Hamilton's MIL No. 29. Any way you look at it, there is considerable overlap between the testimony and opinions of Plaintiffs seven liability experts.

Plaintiffs' counsel's argument regarding Dr. Freeman is confusing, and, at best, self-defeating. Plaintiffs' counsel claims that they specifically elicited testimony from Dr.

[12] Plaintiffs now represent that they do not intend to call Dr. Stohl, but still have not committed to formally withdrawing her.

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Freeman about his supposed qualifications in biomechanical engineering in preparation for a motion to exclude Dr. Freeman on his qualifications. But that just proves that Plaintiffs are holding Dr. Freeman out as having qualifications in biomechanical engineering that are relevant to this lawsuit, which is exactly the point of this motion—**Plaintiffs already have a biomechanical engineering expert.** They do not need another.

The Court has authority to limit the parties to one expert per discipline. *Christensen v. Munsen*, 123 Wn.2d 234, 241, 867 P.2d 626, 630 (1994); CR 16(a)(4). Nothing about this motion is unfair as it will require both parties to make concessions. As it currently stands, the parties have disclosed 16 expert witnesses for only a two-week trial. Granting this motion will require the parties to pare that number down to only those experts that are necessary for the presentation of their case. This will eliminate cumulative testimony and promote an orderly and efficient trial.

28. The Court should order that the parties confer no later than one week before trial to discuss a possible stipulation to facts.

Plaintiffs' opposition to this motion is not persuasive. There is no reason to waste the Court's and jury's times proving facts that are not in dispute. Requiring the parties to at least confer about a possible stipulation of agreed facts is common sense. Plaintiffs' counsel's claim that this will somehow require them to "disclose his trial strategy" is perplexing. The defense is certainly not trying to tell Plaintiffs' counsel how to present their case, but they may want to rethink their "trial strategy" if it is focused on proving facts that are not in dispute.

This motion should be granted.

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

Plaintiffs' opposition here is unclear. They seem to be agreeing that Dr. Allen will not testify at trial (like he did in his deposition) that Laura Hamilton used force "in excess of that normally used" or anything of that sort pertaining specifically to Laura Hamilton's

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care in this case. If that is so, then there is no dispute as to this motion and it should be granted.

If that is not Plaintiffs' position, then their opposition is a straw man as they completely ignore Dr. Allen's deposition testimony that Z.H.'s injury "was caused by Laura Hamilton applying traction during the shoulder dystocia to his head for an excess of that normally used and, that there is no other etiology for the injury." (*See* Rand Decl. [5/19/2022] Ex. W at 32:21-25.) Dr. Allen did not merely testify in generalities, he offered an opinion on the specific force that Laura Hamilton used in this specific case, which he characterized as excessive. Dr. Allen is an engineer, not an obstetrician or midwife. He has not delivered a baby and is not even a medical doctor. Dr. Allen is not qualified to offer any opinion that Laura Hamilton used force in "excess of that normally used." Such an opinion crosses the line into standard of care—Dr. Allen is not qualified to opine on the amount of traction that would be within the standard of care and whether the traction used by Laura Hamilton was excessive considering the obstetric emergency she faced. Only a midwife or obstetrician can offer such an opinion, and Plaintiffs have four such experts. Dr. Allen should be precluded from offering this opinion at trial as it will only confuse and mislead the jury. ER 702, ER 403.

Plaintiffs' counsel agrees that they will not elicit Dr. Allen's opinion that "ACOG was a publication designed to protect providers." However, they claim that Dr. Allen can offer this opinion if defense counsel asks him "specifically about what [the ACOG bulletin] says or whether the studies listed in it support the conclusions of the authors." Not so. Defense counsel can ask Dr. Allen about the ACOG bulletin, and he can explain why he disagrees with the substance and why he believes that the studies it cites do not support its conclusion. In no way does this open the door to Dr. Allen's personal and baseless opinion that "ACOG was a publication designed to protect providers." Plaintiffs cite no authority to support their position on this point and it makes little sense.

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Accordingly, Defendant Hamilton requests that this motion be granted.

DATED this 30th day of May 2022, at Seattle, Washington.

JOHNSON, GRAFFE, KEAY,
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s/ Donna Moniz
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CERTIFICATE OF SERVICE

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

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

EXECUTED this 31st day of May 2022, at Seattle, WA.

/s/Monica M. Welch
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