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Nos. 71497-0
(Consolidated with Nos. 71498-8 and 71553-4)

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

OLIVER L. WUTH, a minor, through his Guardian Ad Litem Keith L. Kessler; and BROCK M. WUTH and RHEA K. WUTH, husband and wife,

Plaintiffs-Respondents,

v.

LABORATORY CORPORATION OF AMERICA, a foreign corporation; KING COUNTY PUBLIC HOSPITAL DISTRICT NO. 1, d/b/a VALLEY MEDICAL CENTER; et al.,

Defendants-Appellants,

and

JAMES A. HARDING, M.D.; and OBSTETRIX MEDICAL GROUP OF WASHINGTON, INC., P.S., a domestic corporation,

Defendants-Respondents.

APPELLANT LABCORP'S OPENING BRIEF

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I. INTRODUCTION

LabCorp[1] is appealing $50 million in damages awarded because a child with a hereditary chromosomal condition was born. These damages were awarded under the scarcely-litigated "wrongful birth" and "wrongful life" torts, which were recognized back in 1983 for "defects and anomalies" in children caused by a prescription drug.[2] As damages cannot be awarded for injuries that cannot be established as a matter of law,[3] these claims should have never been considered by a jury. Once at trial, the jury in this case was never given an opportunity to evaluate the case. In the end, the lab (LabCorp) and the clinic (Valley Medical Center ("Valley")) were punished for Dr. James Harding, M.D.'s failure to order a FISH[4] test for his pregnant patient, Rhea Wuth.

Long before her appointment with Dr. Harding, Rhea and her husband, Brock, ("the Wuths") learned that they had a substantial chance of passing on a chromosomal condition to any child they conceived. Although a FISH test was needed to detect that subtle condition, Dr. Harding never ordered it. The only test he ordered was a fetal karyotype

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[1] Appellant/Defendant Dynacare Laboratories, Inc. is a d/b/a of defendant Dynacare Northwest, Inc., which is a subsidiary of defendant Laboratory Corporation of America. For the purposes of this lawsuit, the entities and trade names are one and are collectively referred to as "LabCorp."

[2] *Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 463, 656 P.2d 483 (1983).

[3] *McKernan v. Aasheim*, 102 Wn.2d 411, 419, 687 P.2d 850 (1984).

[4] "FISH" is the acronym for Fluorescence In-Situ Hybridization. CP 793 (attached as Appendix A). A FISH test is a specific type of genetic test that can "detect more subtle translocations" in chromosomes. RP 1323.

test, and LabCorp correctly performed that test.[5] Although LabCorp's report cautioned of the limitations of fetal karyotype testing, Dr. Harding never read the results and failed to order any follow-up tests. The Wuths' son, Oliver, was born with the hereditary chromosomal condition.

The Wuths and Oliver ("the Wuth family") filed suit against Dr. Harding, Valley, and LabCorp. The Wuths asserted a wrongful birth claim seeking damages for mental anguish caused by the birth of their "defective child." Oliver sought expenses he will incur due to his "defects," arguing that he would have been better off not being born.

Months before trial, the trial court struck testimony from LabCorp's expert who opined that Dr. Harding breached the standard of care by failing to read LabCorp's report and consider whether additional testing was required (a theory that the Wuth family had curiously abandoned). Not until shortly before trial did LabCorp, Valley, and the trial court learn that the Wuth family and Dr. Harding had – on an unknown date – reached a settlement under which the family stood to gain $500,000 over and above any verdict if the jury found Dr. Harding *not* liable. The jury was never told about their deal.

After weeks of testimony targeting the clinic where Dr. Harding treated Rhea (Valley) and the lab that performed the test he ordered

[5] CP 793 (attached as Appendix A); CP 2748 (attached as Appendix B).

(LabCorp), the jury attributed 50 percent of awarded damages to each and found Dr. Harding not liable. Although testimony was presented to support, at most, $20,628,306 in economic damages, the jury (which was improperly encouraged to consider deterrence) increased that sum, awarding an even $25 million to Oliver. In addition, the jury awarded a matching $25 million for the Wuths' mental anguish, notwithstanding that such anguish must be offset by the considerable emotional benefits that Oliver brings to their lives. LabCorp and Valley have appealed, and the Wuth family has cross-appealed.

II. ASSIGNMENTS OF ERROR

A. Whether the trial court erred by allowing the Wuth family to seek damages for injuries that cannot be established as a matter of law under theories of "wrongful birth" and "wrongful life"?

B. Whether prejudicial errors that deprived LabCorp of its right to put on a defense necessitate a new trial before a fully-informed, untainted jury?

1. Did the trial court improperly exclude qualified expert opinions on issues that would have been helpful to the jury? If so, is reversal required because those opinions were relevant, not unduly prejudicial, and not cumulative, thereby rendering the errors not harmless?

2. Did the trial court err when it refused to allow the jury to allocate fault based upon theories advanced against Dr. Harding by LabCorp after the Wuth family settled with him and abandoned those compelling theories?

3. Did the trial court err when it deprived the jury of the opportunity to assess the credibility of aligned parties

that held themselves out as adverse and by repeatedly commenting to the jury that the Wuths were not at fault?

4. **Did the trial court err by concluding that deterrence was properly interjected into this compensatory damages trial?**

LabCorp assigns error to the following:

Summary judgment orders: CP 1110-13 (Jan. 11, 2013), CP 2247-49 (Mar. 15, 2013), CP 3140-41 (Jul. 18, 2013) and CP 6383-86 (Oct. 14, 2013) (reconsideration), CP 4955-57 (Oct. 11, 2013).

Orders re motions *in limine*: CP 8794-98 (Oct. 28, 2013), CP 8801-10 (Oct. 29, 2013), CP 10167-75 (Nov. 18, 2013), CP 10813-23 (Nov. 27, 2013), CP 11740-50 (Dec. 12, 2013), CP 11751-55 (Dec. 12, 2013).

Jury instructions: #6 at CP 11607-09, #16 at CP 11619-20, and #18 at CP 11622. Minute entry listing rulings: CP 11633-11718. Judgment: CP 11759-61 (Dec. 20, 2013); order denying post-judgment motions: CP 14209-11 (Jan. 24, 2014).

III. STATEMENT OF THE CASE

A. Oliver Wuth's Life

Oliver Wuth is a developmentally- delayed boy who, at the time of trial, was five years old. RP 2242-43, 2800.[6] He has an overall IQ score of 85, which falls within the average range. RP 1914, 2567-68; *see also* RP 3044-45. He struggles with expressive language, but is "cheerful, friendly, and engaging." RP 1952, 2011. At the time of trial, Oliver was

[6] Oliver was born on July 12, 2008, CP 1616, and trial took place between October and December 2013.

attending public school, where he was enrolled in a special needs Kindergarten class, riding the school bus each day. RP 1515, 1518, 2707.

B. Rhea's Pregnancy With Oliver

1. The Hereditary Chromosomal Condition

When the Wuths got pregnant with Oliver in October 2007, they knew that Brock was a carrier of a chromosomal condition called an "unbalanced 2;9 translocation." RP 580-84; CP 665-71. Brock's adult cousin, Jackie Mills, has an unbalanced 2;9 translocation and suffers from serious physical and cognitive impairments. RP 446. Knowing from consultations with two genetic counselors that there was a very high chance that their unborn child would inherit that condition (which was detectable with a FISH test), the Wuths maintained that they would have terminated any such pregnancy. RP 580-84, 587, 607.

2. Dr. Harding Fails to Order a FISH Test

Rhea made an appointment with Dr. Harding, a physician who is board certified in obstetrics and maternal-fetal medicine, for a CVS[7] procedure to be used for genetic testing. RP 4297, 4302; CP 748. The appointment took place at Valley on December 31, 2007, when Rhea was 12 weeks pregnant. RP 608-09, 613, 4300-01; CP 673. The Wuths

[7] "CVS" is the acronym for Chorionic Villus Sampling. CP 793 (attached as Appendix A). CVS is a procedure like an amniocentesis, where a sample of material is taken to send to the lab for testing. However, unlike an amniocentesis, CVS testing is done in the first trimester of the pregnancy. RP 456:4–11.

brought to their appointment a copy of Brock's genetic test results, identifying "break points" that were essential to locating the subtle translocation. CP 4406, 4409; *see* CP 665-71. Rhea later testified that she told Dr. Harding that a FISH test was needed. RP 611.

Upon her arrival, Dr. Harding cautioned Rhea there was no genetic counselor in the clinic, and proceeded to have "a fairly long discussion" with the Wuths about whether to proceed with CVS that day, given clinic policy that required the presence of a genetic counselor. RP 4302-03, 4473. Based upon the Wuths' high level of knowledge, Dr. Harding decided to proceed without a genetic counselor. RP 4303.

After performing the CVS procedure, Dr. Harding directed a Valley employee (Cathy Shelton) to order a "fetal karyotype" test. RP 4313, 4416, 4791. The requisition form noted a family history of an unbalanced translocation, but did not identify the "break points" that would have provided a roadmap to identify the subtle translocation; the FISH test boxes were not checked, and although the form confirmed that an ultrasound had been done, it did not advise the lab that the ultrasound was abnormal. CP 793 (attached as Appendix A); RP 1149, 4416. Brock's genetic test results that identified the necessary "break points" were never received by LabCorp. RP 4407-10. A theory was offered that

the paperwork could have been lost on LabCorp's end, but the following box on the requisition form indicates that no paperwork was ever sent:

> [ ] CHECK IF PAPERWORK TO BE SENT WITH SAMPLE.

CP 793; RP 648.

3. LabCorp Completes the Genetic Test Ordered by Dr. Harding, But Dr. Harding Fails to Read it or Order Follow-Up Testing

LabCorp completed the fetal karyotype test ordered by Dr. Harding and, on January 7, 2008, reported the following results and limitations:

> Cytogenetic analysis of cultured chorionic villi revealed a MALE karyotype with an apparently normal banding pattern in all metaphases examined.
>
> This result does not exclude the possibility of subtle rearrangements below the resolution of cytogenetics or congenital anomalies due to other etiologies.

CP 2748-49. A genetic counselor at Valley called Rhea to give her the test results. RP 1434; CP 795. Rhea was told that the results confirmed a "normal male karyotype" and also that it "[l]ooks like he is not even a carrier of the translocation." RP 1434, 4722. She was never told about the limitations of the test Dr. Harding ordered as outlined in LabCorp's results, and assumed that the test he ordered was a FISH test. RP 607.

Dr. Harding himself did not review LabCorp's results. RP 4474-75, 4519. Although he expected to receive them two weeks after Rhea's

December 31, 2007 appointment, four weeks passed before he took any other action. CP 673, 676. At Rhea's January 28, 2008 ultrasound appointment, Dr. Harding "flipped open" her chart "to see what had gone on." RP 4475. Relying upon a summary drafted by the genetic counselor instead of the test results—which expressly warned about limitations—Dr. Harding drafted an update to Rhea's primary physician, providing assurances that "the fetal chromosome results were normal, with no evidence of ... a translocation." CP 674; RP 4475, 4782-84.

Oliver was born on July 12, 2008, with the unbalanced 2;9 translocation. RP 1438-39, 1451; CP 733-38.

C. The Wuths Sue Dr. Harding, Valley, and LabCorp, and Then Enter Into a Secret Settlement With Dr. Harding

1. The Wuths Ask the Jury to Award Damages Under "Wrongful Birth" and "Wrongful Life" Causes of Action

The Wuth family sued Dr. Harding, Valley, and LabCorp to recover mental anguish damages caused by the "wrongful birth" of Oliver. CP 1616-28. Oliver himself[8] asserted a "wrongful life" cause of action to recover extraordinary expenses he will incur because he was born with a disability, though his condition was inherited and, therefore, not caused by any defendant. CP 1616-28, 11619. Over objections from LabCorp and

[8] Oliver asserted claims through Guardian ad Litem, Keith L. Kessler. CP 1616.

Valley, the trial court allowed these claims to be asserted under *Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 656 P.2d 483 (1983).[9]

2. The Trial Court Narrows the Wuth Family's Claims Against Dr. Harding, and Strikes LabCorp's Expert

At trial, LabCorp's defense was that others were to blame, primarily Dr. Harding. CP 2236. After evidence was developed by the Wuth family and LabCorp to establish Dr. Harding's numerous breaches of the standard of care, Dr. Harding filed a motion for partial summary judgment, asking that claims asserted *by the Wuth family* be narrowed significantly. CP 2590-606. In a passing comment in his reply brief, Dr. Harding suggested that testimony critical of Dr. Harding from LabCorp's expert, Dr. Andrew London, M.D., "should be stricken or disregarded." CP 2915. Oddly, the Wuth family filed no opposition. RP 7/18/13, at 4. After a series of procedural irregularities,[10] the jury never got to consider any of Dr. London's criticisms of Dr. Harding.

3. The Wuths and Dr. Harding Announce Their Settlement

Sometime before trial, Dr. Harding and the Wuth family entered into a settlement agreement that aligned their interests together against

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[9] *See, e.g.*, CP 3636-747, 3748-49, 4428-34, 4964, 11044-58, 13879-87, 14212-14.
[10] *See infra*, part IV.C.3.

LabCorp and Valley.[11] CP 14219-22.[12] The undated agreement provided a bonus payment of $500,000 beyond the jury's assessment of damages to the Wuth family if the jury found Dr. Harding *not* liable, and capped Dr. Harding's exposure to the limits of his insurance policy if the jury determined that he was liable. CP 14219-20. Therefore, the Wuth family had a strong incentive to shift their theory of liability from the treating physician to the clinic where he consulted with the Wuths and the lab he directed to perform the fetal karyotype test. Likewise, Dr. Harding had an equally strong incentive to embrace the Wuth family's version of events and join in their efforts to prosecute the clinic and the lab.

The trial court, LabCorp, and Valley first learned of this agreement less than one month before trial. CP 10211, 11926. The jury, however, never learned of its existence. Although the jury observed unified objections, shared positions, and supportive testimony between Dr. Harding and the Wuth family, the trial court kept from the jury the critical fact that the family and Dr. Harding, who held themselves out as adversaries, actually shared a goal. RP 4015.

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[11] The agreement's terms indicate that it was entered into before an emergency stay was ordered by this Court on April 4, 2013, in connection with Valley's motion for discretionary review, No. 70052-9-I. CP 14219-22.

[12] This citation is to the redacted version of the agreement that was filed in the public record. The full agreement, which the trial court determined was properly filed under seal to protect Dr. Harding's privacy, appears at CP 14277-80 (sealed). The discussion of the agreement set forth in this brief addresses only the parts of the agreement that were filed in the public record.

4. The Trial Court Prohibits LabCorp from Allocating Fault to Dr. Harding

Aware of the settlement reached between the Wuth family and Dr. Harding, the trial court nonetheless agreed to insulate Dr. Harding from theories of liability that had been abandoned by the Wuth family – including those that were being pursued by LabCorp. Even though a critical part of LabCorp's defense was the allocation of fault to Dr. Harding, and even though the Wuth family stood to gain an extra $500,000 if Dr. Harding was found not liable, the trial court expressly prohibited LabCorp from presenting evidence on "issues against Dr. Harding" that were broader in scope than the artificially-narrow theory of liability being pursued – post-settlement – by the Wuth family. RP 4015. The jury was only allowed to evaluate whether "Dr. Harding was negligent if he failed to instruct Valley's medical assistant, Cathy Shelton, to send clinical information that identified the chromosomes and breakpoints with the test requisition forms and CVS sample to LabCorp." CP 11607-08.

D. A Six-Week Trial, the Jury Verdict, and the Appeals

Although it was Dr. Harding's responsibility to ascertain and order the appropriate test(s),[13] the trial strategy of Dr. Harding and the Wuth family was that LabCorp should have (1) detected from the limited

[13] RP 4986.

information it received that additional information might have existed about a chromosomal condition in the father of the baby, (2) called Dr. Harding or Valley to ask for that information, and (3) upon receipt of any such additional information, recommended that Dr. Harding order a FISH test so LabCorp could perform it. RP 444-73, 541, 543. The focus of the inquiries about the roles of Valley and LabCorp centered around whether Valley failed to send the paperwork or whether the paperwork could have been lost on LabCorp's end. *See, e.g.,* RP 648.

The six-week trial, however, touched on a variety of hot-button issues, including misleading descriptions of this case as if it involved a threat to Rhea's right to choose to have an abortion,[14] criticism of persons who hold pro-life views,[15] the purpose of the tort system being to deter,[16] and the notion that "corporate medicine" sacrifices the quality of patient care for return on investment.[17] The 12 jurors who decided this case

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[14] RP 10/22/13, at 4 (telling potential jurors that the Wuths' "injury [was] from not being able to exercise their right to terminate the pregnancy"); RP 10/24/13, at 224 (telling potential jurors that the Wuths are "going to be asking for a lot of compensation for ... not having the right to have an abortion").

[15] RP 10/22/13, at 14, 179, 215; RP 1/17/14, at 26-27 ("Pro life" is not the law of the land. It may be a personal opinion that we all respect, but it is not the law.").

[16] RP 5388-89 (to the jury during closing arguments: "Let's chat for a minute about damages and the policies of the civil law system."); *see* RP 10/24/13, at 198 (opining before trial that it was necessary to reverse "a swing of the pendulum to the point where juries don't understand why we have a tort system anymore"); RP 1/24/14 at 51 (commenting after trial that "it's really necessary these days, in personal injury cases, [to mention deterrence] because jurors have been saturated with public information campaigns designed to persuade them that there isn't any value to the tort system, that it's just some greedy lottery for greedy plaintiffs").

[17] RP 2345, 4330, 5308 (the Wuth family's counsel discussing corporate medicine).

answered with an unqualified "no" to the following question: "Under most circumstances, do you believe that abortion is morally wrong or should be illegal?" CP 8710-11,[18] 11806. The trial court questioned those who answered, "yes" and dismissed eight of them for cause.[19]

Then, throughout the trial, the trial judge told the jury again and again that the Wuths had done nothing wrong and could not be blamed even though a ruling was issued pre-trial that removed them from the verdict form. CP 632-35, 1110-13.[20] The trial judge was deliberate in these efforts, explaining to counsel before trial: "I'm going to be quite

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[18] The potential jurors' written responses to this written question are not in the record on appeal because they were destroyed by the trial court. *See* GR 15(h)(1). The trial court explained that the court unilaterally identified jurors to subject to identical follow up questioning based on any marking that appeared on the questionnaire other than "no," whether that marking was a smiley face or anything else:

> [I]f [the potential jurors] indicated anything on the questionnaire other than "no" -- if they put a question mark or left a blank, or put a smiley face or did anything other than mark "no," we destroyed -- strike that -- we brought those people that said anything other than "no," up to the court and we examined them in open court on the record.
>
> ***
>
> For all the people that answered affirmatively or did anything else, you have a record of what they said in the questionnaire from the transcript.
>
> ***
>
> That's how we keep our record.

RP 12/20/13, at 6-7; *see* RP 10/21/13, at 141:14–18, 145:21–22, 148:10–11, 177:10–12, 185:5–6, 214:5–17, 234:3–5; RP 10/22/13, at 58:1–5, 68:13–16, 69:10–14, 74:9–11, 101:11–12, 106:13–15 (juror responses).

[19] CP 8710–8711; RP 10/21/2013, at 141:14–18, 145:21–22, 148:10–11, 177:10–12, 185:5–6, 214:5–17, 234:3–5; RP (10/22/13), at 58:1–5, 68:13–16, 69:10–14, 74:9–11, 101:11–12, 106:13–15.

[20] Although conflicting evidence was presented as to whether the Wuths could be found contributorily negligent, the trial court resolved this issue on summary judgment. CP 836-87, 909-1001.

strong with the jury about that. They will have it burned into their brains that there is not fault on the part of the plaintiffs." RP 10/21/13, at 35.

On Oliver's economic damages claim, the Wuth family's attorney was specific and emphatic about the maximum amount supported by the evidence: he asked the jury six times during closing arguments to award $20,628,306 (or, alternatively, shortened to $20 million) "and not a dime more." RP 5287; *see* RP 5287, 5295, 5299, 5308, 5287, 5421. Coupled with this request, however, was a narrative about the important role that deterrence played in setting an appropriate amount of compensatory damages. Although the trial court warned counsel not to "tell the jury basically to enter a verdict to deter these defendants and to send a message," he nonetheless focused his closing arguments on deterrence. *See, e.g.*, RP 5255, 5308, 5417. The trial judge concluded that counsel for the Wuth family and counsel for Dr. Harding made improper deterrence comments during closings, and then – over LabCorp's objections – offered a confusing instruction in an apparent attempt to explain why deterrence played a role in this case. RP 5384, 5389.[21]

After hearing about abortion, deterrence, and the corporatization of medicine, and that the Wuths did nothing wrong, the jury – with no ability to allocate fault to Dr. Harding for his key role in this case – returned a

[21] *See infra*, part IV.D.2 (discussing deterrence and the trial court's instruction).

verdict against LabCorp and Valley with 50 percent of awarded damages attributed to each. CP 11721-22. The jury determined that Dr. Harding was not liable for the only claim they were allowed to consider, *i.e.*, whether he failed to instruct Valley's medical assistant to send clinical information to LabCorp. CP 11607-08, 11721-22. On damages for Oliver, although the request was for precisely $20,628,306 in economic damages, the jury awarded $25 million. RP 5287; CP 11721-22. In addition, the Wuths received a matching $25 million for their "net" surplus of mental anguish. CP 11721-22. The trial court entered judgment and denied post-judgment motions. CP 11762-64. Dr. Harding paid $500,000 to the Wuths as required by their settlement; LabCorp, Valley, the Wuths, and Oliver have appealed.[22] CP 14223-49, 14250-55.

IV. ARGUMENT

A. Summary of Arguments

The *Harbeson* wrongful birth and wrongful life claims were created to compensate parents of children who suffered "defects and anomalies" proximately caused by a prescription drug. *Harbeson*, 98 Wn.2d at 463. In modern times, children with disabilities are no longer considered "defective." And in this case, Oliver's disabilities were not

[22] After numerous rounds of briefing to this Court and the trial court, a three-judge panel ultimately affirmed Commissioner Masako Kanazawa's determination that the amount of supersedeas bond posted by LabCorp was proper and, with Valley's Notice of Supersedeas, was sufficient to stay enforcement of the judgment pending appeal.

proximately caused by any defendant; the only way Oliver would have ever been born was as a child with disabilities caused by his inherited condition. To the extent these torts can even be claimed, the injuries sought (mental anguish caused by Oliver's birth offset by the emotional benefits, and extraordinary expenses Oliver will incur due to his "defects," based on the notion that he would have been better off not being born) cannot be established as a matter of law. Therefore, this case should have been dismissed on summary judgment and never gone to the jury.

To the extent these claims could survive summary judgment, a fully-informed jury able to consider improperly-excluded testimony and fairly assess credibility of the parties must be given an opportunity to hear and decide this case. If this Court agrees with any of the issues raised in this brief, a new trial is required for LabCorp and Valley because each issue raised fundamentally and prejudicially impacted the jury's determination of liability, allocation, and damages. If this Court agrees with any of the issues raised in Valley's opening brief, a new trial is likewise required for LabCorp and Valley.

B. The Wrongful Birth and Wrongful Life Claims Must be Dismissed Because, as a Matter of Law, Their Damages Cannot be Ascertained

More than 30 years ago, *Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 656 P.2d 483 (1983), first recognized two new causes of action in

Washington state: "wrongful birth" and "wrongful life." Since that time, the scant number of reported decisions indicates that these torts are rarely litigated. This is not surprising, given our Supreme Court's holding just one year later that it is impossible to determine whether the benefit to parents of having a child is outweighed by the detriment to the parents of having that child,[23] coupled with Washington's prioritization in recent decades of self-determination and individual rights, including the enactment of the Americans With Disabilities Act and the now-universal recognition that people with disabilities have equal rights under the law.[24]

For the reasons argued below and under the Privileges and Immunities Clause, article I, section 12 of the Washington Constitution, dismissal of the Wuths' wrongful birth claim and Oliver's wrongful life claim is required because liability cannot be imposed where, as here, the fact of damage cannot be determined with reasonable certainty. CP 2247-49, 4955-57; *see* RAP 2.5(a)(2); *Schroeder v. Weighall*, 179 Wn.2d 566, 571-72, 316 P.3d 482 (2014). This Court reviews these issues *de novo*. CR 56(c); *Lybbert v. Grant Cnty*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

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[23] *McKernan v. Aasheim*, 102 Wn.2d 411, 412-13, 687 P.2d 850 (1984).

[24] *See* 42 U.S.C. §§ 12111 (Americans With Disabilities Act ("ADA"), enacted in 1990); *see, e.g.*, Ch. 9.02 RCW (Reproductive Privacy Act, enacted in 1992); Ch. 70.245 RCW (Death With Dignity Act, enacted in 2009); *see also Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 271, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990) ("[N]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.").

1. The $25 Million General Damages Award to the Wuths Must be Vacated

a) Emotional Injury from Wrongful Birth is Impossible to Determine

"The guiding principle of tort law is to make the injured party as whole as possible ... without conferring a windfall." *Shoemake ex rel. Guardian v. Ferrer*, 168 Wn.2d 193, 198, 225 P.3d 990 (2010) (quotations and citations omitted). Our Supreme Court applied this fundamental principle in *Harbeson* when it acknowledged that the birth of a child provides an emotional benefit that must be weighed against the parents' claimed emotional injury caused by the birth. "In considering damages for emotional injury, the jury should be entitled to consider the countervailing emotional benefits attributable to the birth of the child." *Harbeson*, 98 Wn.2d at 475 (citing, *inter alia*, Restatement (2d) of Torts § 920 (1977)).

Just one year after *Harbeson* endorsed the "benefits rule" to determine what damages could be recovered for wrongful birth, our Supreme Court in another wrongful birth case, *McKernan v. Aasheim*, rejected the underlying premise of that damages analysis and concluded that it is impossible to calculate emotional benefits that will be conferred by a child. 102 Wn.2d 411, 419, 687 P.2d 850 (1984) (involving a failed sterilization). The Court explained why "it is impossible to establish with

reasonable certainty whether the birth of a particular healthy, normal child damaged its parents":

> The child may turn out to be loving, obedient and attentive, or hostile, unruly and callous. The child may grow up to be President of the United States, or to be an infamous criminal. **In short, it is impossible to tell, at an early stage in the child's life, whether its parents have sustained a net loss or net gain.**

McKernan, 102 Wn.2d at 419-20 (emphasis added). "Uncertainty as to the fact of damage is a ground for denying liability." *Id.* (citing *Wenzler & Ward Plumbing & Heating Co. v. Sellen*, 53 Wn.2d 96, 98, 330 P.2d 1068 (1958)). Thus, to the extent *Harbeson* stood for the proposition that parents may assert a claim for wrongful birth to recover damages for the net emotional injury sustained due to the birth of a child, that proposition was overruled by *McKernan* and is no longer good law.

Here, the jury's general damages award of $25 million to the Wuths, mirroring the award of special damages to Oliver, is irreconcilable with the Wuths' near-equivocation regarding their claimed emotional injuries[25] and confirms that there is no meaningful way for a jury to consider the net impact to the Wuths of having their son. The Wuths

[25] In response to the question, "Do you feel you have suffered more emotional harm from Oliver's existence than the emotional benefit you have received from him?" Brock responded, "I think so." RP 2839. Rhea similarly responded to the question, "do you feel as though the emotional anguish you have suffered by having Oliver in your life is greater than the emotional benefits you have received from having Oliver in your life?" a less than resounding, "I would say yes." RP 1833.

testified about difficulties they have had, and also about how much they love Oliver; Oliver's grandmother, who is his primary caregiver, told the jury that Oliver has enhanced all of their lives. RP 1733, 1904, 2725, 2787, 2800. The fact that the jury awarded $25 million in "net" general damages that lacked any nexus to the testimony presented merely underscores the impossibility of the task presented. As the emotional injury from a "wrongful birth" is impossible to determine with certainty, the jury's general damages award to the Wuths must be vacated.

b) Wrongful Birth Claims Violate Public Policy

In *McKernan*, our Supreme Court also held that application of the "benefits rule" was contrary to public policy because it would require parents to prove their child was "more trouble than it was worth" and because it was simply not possible to assign a distinct value for each child:

> [A]n unhandsome, colicky or otherwise "undesirable" child would provide fewer offsetting benefits, and would therefore presumably be worth more monetarily in a "wrongful birth" case. The adoption of that rule would thus engender the unseemly spectacle of parents disparaging the "value" of their children or the degree of their affection for them in open court. It is obvious, whether the conclusion is phrased in terms of "public policy," or otherwise, that such a result cannot be countenanced.

102 Wn.2d at 420 (quotation marks and citation omitted). This unseemly spectacle is precisely what played out before the jury in this case: in order

to attempt to prove their claims, the Wuths had to testify that they believed they were worse off because of their son. RP 1833, 2838-39.

McKernan also reasoned that "the simple fact that the parents saw fit to allege their child as a 'damage' to them would carry with it the possibility of emotional harm to the child." *McKernan*, 102 Wn.2d at 421. Our Supreme Court refused to ignore this concern: "[w]e are not willing to sweep this ugly possibility under the rug by stating that the parents must be the ones to decide whether to risk the emotional well being of their unplanned child." *Id.*

The *McKernan* holding reinforces Washington's strong interest in promoting conduct and behavior that prioritizes the best interests of children. *See McDaniels v. Carlson*, 108 Wn.2d 299, 310, 312, 738 P.2d 254 (1987) (paternity actions); *In re Marriage of Littlefield*, 133 Wn.2d 39, 54, 940 P.2d 1362 (1997) (parenting plans). In legal proceedings involving children, consideration is given to a number of factors that focus on the child's well-being, including the child's own relationships and the child's subjective awareness of the issues being litigated. *See McDaniels*, 108 Wn.2d at 310-13 (litigation involving a child's relationships "threatens the stability of the child's world"). Wrongful birth and wrongful life lawsuits are premised on an outdated and deplorable notion that a child with disabilities is "defective" and never should have been

born;[26] parents (and ultimately a jury) are called upon to publicly assign a monetary value to the emotional burden of the child's existence.[27]

In recognition of these important principles, this Court should reaffirm that incentivizing parents to assert claims that their child is "more trouble than he is worth" violates the public policy of Washington state, and vacate the sums that LabCorp and Valley were ordered to pay the Wuths.

2. The $25 Million Award to Oliver Must be Vacated

Washington is one of just three states that, during the early 1980s, judicially recognized a cause of action for "wrongful life."[28] Since that time, no other appellate court has agreed with these decisions, and most states have flatly rejected requests to recognize such a tort.[29] Many courts

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[26] *See* Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 Harv. C.R.-C.L. L. Rev. 141, 144 (2005) ("Wrongful birth and wrongful life suits may exact a heavy price not only on the psychological well-being of individuals with disabilities, but also on the public image and acceptance of disability in society. Rather than focusing on a defendant's conduct, as in a traditional tort action, both wrongful birth and wrongful life suits ultimately focus on the plaintiff's disability, a status that is at least partially a societal construction. Juries in such actions are required to evaluate whether a particular disability is so horrible, from the nondisabled perspective, as to make plausible the choice of abortion or contraconception by the parent, or non-existence by the disabled child.") (available at CP 3659-3713).

[27] Even if it could be determined that a child will never have "the ability to comprehend the nature of the assertions in play, … it is precisely when the most vulnerable members of society are unaware of potential danger that society should protect them most vigorously." Hensel, 40 Harv. C.R.-C.L. L. Rev. at 173-74.

[28] Hensel, 40 Harvard C.R. – C.L. L. Rev. at 160-61 (citing *Turpin v. Sortini*, 643 P.2d 954, 965 (Cal. 1982) (child may recover extraordinary medical expenses occasioned by the child's defect in wrongful life action); *Harbeson*, 98 Wn.2d at 479-80 (same); *Procanik by Procanik v. Cillo*, 478 A.2d 755, 757 (N.J. 1984) (same)) (available at CP 3659-3713).

[29] *Kassama v. Magat*, 792 A.2d 1102, 1119-23 (Md. 2002).

reason that a life burdened with defects is still better than no life at all, and that the plaintiff child suffered no legally cognizable injury by being born.[30] Some courts conclude that damages from life, when compared to no life, are simply incalculable.[31] Courts have also articulated a variety of public policies that warrant rejection of the tort, including the recognition that courts "should not become involved in deciding whether a given person's life is or is not worthwhile,"[32] and the overriding desire "to protect and to preserve the sanctity of all human life."[33]

Harbeson's explanation of the tort of "wrongful life" was that it "is the child's equivalent of the parents' wrongful birth action." 98 Wn.2d at 478. But while the right to prevent the birth of a child is based on the parents' constitutional right to reproductive autonomy,[34] a child does not have a right to *not* be born. Instead, before birth, our Supreme Court has confirmed that a fetus has no cognizable constitutional interests to balance against the mother's liberty interest. *Stewart-Graves v. Vaughn*, 162 Wn.2d 115, 131, 170 P.3d 1151 (2007) (citing *Planned Parenthood v.*

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[30] *Kassama*, 792 A.2d at 1119 (surveying states).
[31] *See, e.g., Azzolino v. Dingfelder*, 337 S.E.2d 528, 533 (N.C. 1985); *Becker v. Schwartz*, 386 N.E.2d 807, 812 (N.Y. 1978); *Dumer v. St. Michael's Hosp.*, 233 N.W.2d 372, 275-76 (Wis. 1975).
[32] *Smith v. Cote*, 513 A.2d 341, 352 (N.H. 1986), *overruled on other grounds by Clark v. Children's Mem. Hosp.*, 955 N.E.2d 1065, 1084-85 (2011).
[33] *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691, 702 (Ill. 1987).
[34] *Stewart-Graves v. Vaughn*, 162 Wn.2d 115, 130, 170 P.3d 1151 (2007) (citing *Harbeson*, 98 Wn.2d at 472, *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965)).

Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L.Ed.2d 674 (1992)). Thus, the *Harbeson* Court's attempt to justify wrongful life as a mere version of wrongful birth highlights the difficulty in ascertaining the appropriate way to set and measure damages in a wrongful life claim.

Harbeson aptly recognized that "measuring the value of an impaired life as compared to nonexistence is a task that is beyond mortals, whether judges or jurors." *Harbeson*, 98 Wn.2d at 482. For this reason, general damages are "certainly beyond computation" and are not available in wrongful life actions. *Id.* *Harbeson* authorized recovery of special damages for "extraordinary expense for medical care and special training" that are calculable and can be proven. *Id.* Our Supreme Court's comprehensive analysis of recoverable damages set forth in *McKernan*, 102 Wn.2d 411, including its "fact of injury" reasoning and general make-whole recovery, apply equally to a claim for specific damages caused by wrongful life.

"A plaintiff is entitled to that sum of money that will place him in as good a position as he would have been but for the defendant's tortious act." *Shoemake ex rel. Guardian*, 168 Wn.2d at 198. In a claim for wrongful life, even though it is possible to calculate the costs of care related to a child's disability, it is not possible to compare such costs to the alternative, *i.e.*, the child's non-existence. Without such a comparison, the

fact of the child's damage merely from being born cannot, as a matter of law, be determined, and no liability can be found. As a result, the verdict for Oliver must be vacated, and his claim dismissed.

C. The Trial Court Erroneously Denied LabCorp the Opportunity to Present Theories of Dr. Harding's Fault

Part of LabCorp's defense against the Wuth family's claims turned on establishing that others that played a role in the chain of events failed to satisfy their applicable standards of care. LabCorp was entitled to seek to allocate fault to other parties, and to present evidence to the jury to support that allocation of fault. RCW 4.22.070(1).

Due to a series of mistakes and irregularities, some of the expert opinion testimony LabCorp intended to rely upon to support its allocation of fault to Dr. Harding was improperly excluded at trial. Moreover, even though some expert opinion testimony supporting LabCorp's theories of Dr. Harding's fault was presented to the jury, the trial court nevertheless erroneously refused to allow the jury to consider those theories for purposes of LabCorp's allocation of fault to Dr. Harding. The trial court erred when it took this issue from the jury, and that error compounded the prejudice to LabCorp from the court's exclusion of key expert opinion testimony, thus confirming that the exclusion of that evidence is reversible error.

1. LabCorp Was Entitled to Assert that Dr. Harding Was At Fault for the Wuth Family's Claimed Injuries

Under RCW 4.22.070(1), "any party to a proceeding can assert that another person is at fault." *Mailloux v. State Farm Mut. Auto. Ins. Co.*, 76 Wn. App. 507, 511, 887 P.2d 449 (1995) (citing *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 25, 864 P.2d 921 (1993)); RCW 4.22.070(1).[35] In its Answer, LabCorp pleaded an affirmative defense that "the incident in question resulted from the acts or omissions of persons or entities other than LabCorp for which LabCorp is in no way responsible or liable." CP 2236.

The assertion of fault under RCW 4.22.070 is distinct from an assertion that a party is liable to the plaintiff:

> Only the plaintiff ... can assert that another person is liable to the plaintiff. If no one proves fault, the other person is neither at fault nor liable to the plaintiff. *Adcox*, 123 Wn.2d at 25-26. If the plaintiff proves fault that is a proximate cause of the plaintiff's damages, the person at fault is also liable to the plaintiff, and judgment is entered as set forth in the statute. If a party other than the plaintiff proves fault that is a proximate cause of the plaintiff's damages, the person at fault is not liable to the plaintiff - the plaintiff has made no claim against him or her - but his or her fault nevertheless operates to reduce the "proportionate share" of damages that the plaintiff can recover from those against whom the plaintiff has claimed.

Mailloux, 76 Wn. App. at 511-12.

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[35] Fault means "acts or omissions ... that are in any measure negligent or reckless." RCW 4.22.015.

Where, as here, plaintiffs (the Wuth family) voluntarily limited the scope of their claims against a defendant (Dr. Harding), any other defendants (including LabCorp) remain entitled to present evidence of that defendant's (Dr. Harding's) fault to invoke RCW 4.22.070(1)'s allocation procedure. *See Adcox*, 123 Wn.2d at 25. Indeed, this case is not unlike any other case in which a plaintiff decides, for any reason, not to pursue a claim against a particular party, and the targeted defendants seek to allocate fault to the "empty chair." So long as the targeted defendants present sufficient evidence to support a jury's attribution of fault to that other person, the allocation issue must go to the jury.

2. The Trial Court Erred When It Ruled the Jury Could Only Consider the Wuth Family's Post-Settlement Narrowed Claim Against Dr. Harding, and Not His Other Breaches of the Standard of Care

After the Wuth family agreed to settle claims against Dr. Harding, they pared down their allegations against him. Despite LabCorp's efforts to allocate fault to Dr. Harding based on all theories supported by expert opinions and evidence presented at trial, as the trial drew to a close, the trial court expressly prohibited LabCorp from attributing fault to Dr. Harding based on any other theory of his negligence. RP 5201, 5207-08; *see* CP 2723-25, 11250-95 (theories of Dr. Harding's negligence).

The expert testimony presented at trial regarding Dr. Harding's breaches of his standard of care went beyond the Wuth family's narrowed claim. The Wuth family's experts Dr. Mark Incerpi and Dr. Robin Clark both testified that the standard of care for Dr. Harding required him to ensure that all of the pertinent clinical information reached the lab.[36] Dr. Incerpi also testified at trial that Dr. Harding had acted not only as a perinatologist, but also as a genetic counselor for the Wuths at the CVS appointment, and that Mrs. Wuth did not receive adequate genetic counseling from Dr. Harding that day. RP 2657.

At the end of trial, the trial court refused to instruct the jury on the duty of perinatologists to provide critical information to the lab as outlined by Dr. Incerpi or on any other theory, and instead gave the following instruction that recited only the Wuths' own theory against Dr. Harding:

> Dr. Harding was negligent if he failed to instruct Valley's medical assistant, Cathy Shelton, to send clinical information that identified the chromosomes and breakpoints with the test requisition forms and CVS sample to LabCorp.

CP 11607-08.

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[36] Dr. Marc A. Incerpi, M.D, a perinatologist, testified as follows: "I think that when we're ordering tests, it's our duty and responsibility to provide as much clinical information as we can." RP 1100; "[Y]ou agree that ... it is our duty and responsibility to provide as much clinical information as we can, meaning perinatologists? A.[by Marc A. Incerpi, M.D.] Correct." RP 2634; noting facts regarding Mrs. Wuth's abnormal ultrasound and history of spontaneous abortions on the form provided to the lab "would fall to Dr. Harding's responsibility" RP 2637. Dr. Clark also testified that she "would always say the information that was provided to him for the laboratory needed to be transferred to the laboratory." RP 1190.

LabCorp was entitled to have the jury instructed on its theory of the case. *See State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986); *Henderson v. Tyrrell*, 80 Wn. App. 592, 612, 910 P.2d 522 (1996). The trial court erred when it refused to do so, and therefore the jury's verdict must be vacated and the case remanded for a new trial.

3. The Trial Court Erred by Improperly Limiting Expert Testimony on Dr. Harding's Negligence

a) Testimony from LabCorp's Expert, Dr. London Was Erroneously Excluded

Dr. Andrew London, M.D., has been a board-certified obstetrician and gynecologist since 1976, and currently serves as an Assistant Professor of Obstetrics and Gynecology at the Johns Hopkins School of Medicine. CP 10992; *see* CP 10997-11000. He has experience co-managing high-risk patients with perinatologists, performing many amniocentesis procedures, generating reports from genetic tests performed on CVS samples, and referring patients for genetic counseling. CP 10992. Dr. London was retained by LabCorp to provide expert opinion testimony in support of LabCorp's allocation of fault to Dr. Harding. Specifically, LabCorp planned to rely on Dr. London's opinion that Dr. Harding breached the standard of care by "failing to read LabCorp's report, thereby abandoning the opportunity to appreciate the limitations of the karyotype

test and make an informed decision regarding whether additional testing was necessary."[37] CP 10993.

Several months before trial, Dr. Harding filed a motion for partial summary judgment seeking to limit the negligence claims asserted against him to the theory that he was negligent if he failed to instruct the Valley medical assistant to attach a copy of Brock's genetic test report to Rhea's lab requisition form. CP 2590-2606. In response to Dr. Harding's motion, LabCorp argued, based on opinions provided by the Wuths', Dr. Harding's and LabCorp's experts, that the evidence supported other theories of Dr. Harding's negligence. CP 2722-823. LabCorp relied in part on testimony from Dr. London opining that Dr. Harding breached the standard of care when he failed to review the results to determine whether additional testing was necessary. CP 2736-37; 2813-17.

Dr. Harding formally moved to strike opinions from his consulting experts. CP 2906-10. Separately, Dr. Harding made a passing suggestion that testimony from LabCorp's testifying expert, Dr. Andrew London, M.D. "should be stricken or disregarded." CP 2915. In doing so, Dr. Harding acknowledged that the issue of whether Dr. London would testify

[37] LabCorp also proposed to introduce testimony from Dr. London that Dr. Harding breached the standard of care by "failing to order a test capable of detecting the 2;9 translocation, which includes the failure to call the lab and ask which test should be ordered if he did not know," and "failing to ensure that the documentation sent to LabCorp included all relevant clinical information." CP 10993.

at trial would be addressed in response to a motion *in limine* that was already on file. CP 2915, *see also* RP 7/18/13, at 11, 43.

At the hearing on the motion for summary judgment, the trial court judge said he was striking Dr. London's opinions "for now," despite the fact that LabCorp had had no opportunity to brief the issue or to submit evidence regarding the two-step inquiry required under ER 702. RP 7/18/13, at 48; *Reese v. Stroh*, 128 Wn.2d 300, 305-06, 907 P.2d 282 (1995). The court acknowledged LabCorp's request to introduce Dr. London's testimony at trial and invited LabCorp to "note that by way of either a motion for reconsideration or a separate motion." RP 7/18/13, at 48; CP 3140-41. The trial court then entered a written order stating, "Dr. Harding's motion to strike is granted as to Dr. London." CP 3141.

LabCorp and Valley immediately asked the court to confirm whether its order addressed only the striking of Dr. London's testimony for purposes of the summary judgment motion and not its admissibility at trial. CP 3142-99, 3200-04. Just before the case was transferred to a different judge (one week before trial), the first judge denied the motion to reconsider or clarify, adding a handwritten interlineation to the order referencing "the precise language of the 18 July 2013 Order," *i.e.*, granting the motion to strike Dr. London's testimony for summary judgment purposes. CP 6368-86 (referencing CP 3140-41) (attached as Appendix

C). "The court's written order controls over any inconsistency with its oral ruling." *In re Interest of M.B.*, 101 Wn. App. 425, 470, 3 P.3d 780 (2000). Thus, regardless of any unclear or inconsistent statements made during the hearing on the motion for partial summary judgment, his ruling on Dr. London did not extend to his testimony during trial.

Unfortunately, the newly-assigned trial judge granted Dr. Harding's motion *in limine* to exclude Dr. London's testimony during trial, apparently under a mistaken belief about the prior ruling:

> Why is Dr. London an issue? [The first judge] ruled, and I'll tell you, folks, his rulings are law of the case. ... I won't revisit [the first judge's] rulings. ... Once he's ruled, you folks are stuck with his ruling, even if you're convinced it error, and I know you're convinced it's error.

RP 10/23/13, at 23-24; CP 8795;[38] *see* CR 54(b) (interlocutory orders are subject to revision at any time); King County LCR 7 (b)(7) (circumstances that warrant reopening a motion to obtain a ruling from a different judge). Later, the judge presiding over trial reiterated her unwillingness to even consider the subject, allowing LabCorp to file a written offer of proof, but dismissively announcing: "I won't be reading it, though." RP 3469; *see* CP 10986-11000 (offer of proof).

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[38] The trial court checked "GRANTED" next to the following statement: "Unqualified experts of the co-defendants, including Dr. London, are precluded from testifying that Dr. Harding violated the standard of care." CP 8795.

b) Dr. London Was a Qualified Expert Whose Testimony Would Have Helped the Jury Understand Dr. Harding's Breaches of the Standard of Care

The admissibility of expert testimony is governed by ER 702, which "involves a two-step inquiry—whether the witness qualifies as an expert and whether the expert testimony would be helpful to the trier of fact." *Reese*, 128 Wn.2d at 305-06 (citations omitted). "Expert testimony is usually admitted under ER 702 if helpful to the jury's understanding of a matter outside the competence of an ordinary layperson. … Medical malpractice cases are a prime example of cases where such testimony is needed." *Id.* at 308. In Washington, "[i]t is the scope of a witness's knowledge and not artificial classification by professional title that governs the threshold question of admissibility of expert medical testimony…" *Pon Kwock Eng v. Klein*, 127 Wn. App. 171, 172, 110 P.3d 844 (2005) (citation omitted). "So long as a physician with a medical degree has sufficient expertise to demonstrate familiarity with the procedure or medical problem at issue, '[o]rdinarily [he or she] will be considered qualified to express an opinion on any sort of medical question, including questions in areas in which the physician is not a specialist.'" *White v. Kent Med. Ctr., Inc., P.S.*, 61 Wn. App. 163, 173, 810 P.2d 4

(1991) (quoting 5A Karl B. Tegland, Washington Practice: Evidence § 290[2], at 386 (3d ed. 1989)).

No serious argument can be made that Dr. London did not meet the criteria set forth in *Pon Kwock Eng*, 127 Wn. App. at 172, and *White*, 61 Wn. App. at 173. CP 10992, 10997-11000. Given the nature of the allegations made in this lawsuit, this testimony was highly relevant and not unduly prejudicial. Indeed, the proffered opinions addressed the core issue of whether Dr. Harding breached the standard of care. Unfortunately, neither of the trial judges undertook the two-step analysis required by ER 702 for Dr. London, despite LabCorp's repeated requests that they do so. RP 7/18/13, at 48;[39] CP 3151-55, 7494-96; RP 23-4; CP 10986-11000. This failure to exercise discretion, in itself, constitutes an abuse of discretion. *See Bowcutt v. Delta N. Star Corp.*, 95 Wn. App. 311, 320, 976 P.2d 643 (1999).

c) LabCorp Was Improperly Denied the Opportunity to Elicit Opinion Testimony from the Wuths' Testifying Expert, Dr. Robin Clark

In an effort to support its allocation of fault to Dr. Harding and to ameliorate the extreme prejudice caused by the erroneous exclusion of Dr.

[39] To the extent the court discussed the professional qualifications of Dr. London in connection with the motion to strike references to the Wuths' and Dr. Harding's consulting experts, because that motion did not address Dr. London, LabCorp had no opportunity to brief the issue or submit evidence to the court regarding Dr. London's qualifications under ER 702 at that time.

London's testimony at trial, LabCorp also sought to introduce opinion testimony from the Wuths' testifying expert, Dr. Robin Clark, M.D., regarding Dr. Harding's breaches of the standard of care.

Dr. Clark, a board certified physician in pediatrics, genetics, and cytogenetics who testified during the Wuths' case-in-chief, offered pre-trial opinions that Dr. Harding violated the standard of care by: not changing his protocols when his team was missing a genetic counselor to offer the Wuths the same care they would have received if the genetic counselor had been there; not seeing the "considerable risk" that a CVS would miss a chromosomal abnormality, given the abnormal ultrasound and very serious family history; not contacting the laboratory; and not communicating the family genetic history and location of the chromosome that was necessary for the adequate assessment of Rhea's sample. CP 10233, 10235-36; RP 1140.

At trial, the Wuth family focused on their narrow post-settlement claim that Dr. Harding was liable only if he failed to provide Brock's genetic test results to LabCorp, and the only testimony they elicited from Dr. Clark regarding Dr. Harding's standard of care was her opinion that "the information that was provided to him for the laboratory needed to be transferred to the laboratory." RP 1190; *see* RP 1138-94. LabCorp

attempted to elicit Dr. Clark's other opinions, but was not permitted to do so. RP 1198, 1257-58, 4014-15; CP 10190-266.

Like Dr. London, Dr. Clark met the criteria set forth in *Pon Kwock Eng* , 127 Wn. App. at 172, and *White*, 61 Wn. App. at 173 – in fact, she testified about Dr. Harding's standard of care at trial. Given the nature of the allegations made in this lawsuit, her testimony regarding other breaches of the standard of care by Dr. Harding was highly relevant and not unduly prejudicial.

4. The Exclusion of Dr. London's and Dr. Clark's Testimony Is Reversible Error

Exclusion of evidence can only be dismissed as harmless error if it is "irrelevant," "unduly prejudicial," or "merely cumulative of other evidence that was admitted." *See Jones v. City of Seattle,* 179 Wn.2d 322, 370, 314 P.3d 380 (2013), *as corrected* (2014); *Brown v. Spokane County Fire Protection Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983).

Given the trial court's assessment that insufficient evidence was presented at trial to support an instruction that allowed the jury to allocate fault to Dr. Harding, no determination can possibly be made that these opinions adverse to Dr. Harding were cumulative of other evidence that was admitted. Therefore, the trial court's erroneous exclusion of these

experts' testimony from trial was reversible (not harmless) error. *See Jones,* 179 Wn.2d at 370; *Brown*, 100 Wn.2d at 196.

D. LabCorp Was Deprived of Its Right to Defend Itself and the Jury Was Unable to Weigh the Evidence or Make Credibility Assessments; Therefore a New Trial is Required

Our Supreme Court "has long recognized that it is the function and province of the jury to weigh the evidence and determine the credibility of the witnesses and decide disputed questions of fact." *State v. Dietrich*, 75 Wn.2d 676, 677-78, 453 P.2d 654 (1969) (citations omitted). Due to a series of erroneous rulings, the jury in this case never heard legal theories or critical evidence and was without the ability to determine the credibility of the parties. As the jury was unable to do its job, reversal of its verdict is required so trial can begin anew, free from these prejudicial errors.

1. The Jury Was Unable to Properly Assess the Credibility of the Wuths or of Dr. Harding

a) The Trial Judge Made Laudatory Comments About the Wuths That Prevented the Jury From Independently Assessing Their Credibility

"Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Washington Constitution, Art. IV, § 16. Section 16 "prohibits a judge from conveying to the jury his or her personal attitudes toward the merits of the case." *State v. Beck*er, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). An instruction to the jury

improperly comments on the evidence if the instruction resolves a disputed issue of fact that should have been left to the jury. *Id.* at 65.

Throughout trial, the trial judge told the jury that the Wuths were not at fault. Indeed, the trial judge announced: "I'm going to be quite strong with the jury about that. They will have it burned into their brains that there is not fault on the part of the plaintiffs." RP 10/21/13, at 35. The trial court did as promised, interjecting comments at regular intervals, often in the midst of critical witness testimony. *See e.g.,* RP 607-08, 609, 710-11, 826, 996, 2686, 4579. The repeated comments from the trial judge improperly and unfairly elevated the credibility of the Wuths over other parties, thereby giving the false impression that their account of events was more deserving of credibility than accounts given by other witnesses. The undeniable effect was that the jurors had "burned into their brains" an enhanced portrayal of the Wuths as people who could do no wrong and were deserving of a sizeable damages award.

b) LabCorp was Prejudiced Because the Jury Was Never Told That the Wuths Aligned Themselves With Dr. Harding

The trial court ruled before trial that the jury would not learn of the settlement agreement between the Wuths and Dr. Harding and reaffirmed this ruling several times during trial. CP 10172; RP 1884:16–1886:18; 4014:13–21; 4015:17–4016:2.

Washington courts recognize that "[t]he existence of an undisclosed agreement between outwardly adversarial parties at trial can prejudice the proceedings by misleading the trier of fact." *McCluskey v. Handorff-Sherman*, 68 Wn. App. 96, 103-04, 841 P.2d 1300 (1992) (noting "unusual synchronization" and "parallel positions"), *aff'd on different grounds*, 125 Wn.2d 1, 882 P.2d 157 (1994). Indeed, as the *McCluskey* court noted, courts routinely require disclosure of pretrial settlement agreements where the respective interests of the parties are changed by the pretrial settlement "so that jurors can consider the relationship in evaluating evidence and the credibility of witnesses." *Id.* at 104. Although ER 408 excludes evidence of settlement agreements as proof that liability has been admitted, such agreements are admissible for other purposes "such as proving bias or prejudice of a witness." ER 408. In this case, LabCorp sought to inform the jury of the mere fact of settlement, *not* the settlement amount. *See Diaz v. State*, 175 Wn.2d 457, 473, 285 P.3d 873 (2012) (concluding that admission of a settlement *amount* violated the collateral source rule, RCW 7.70.080, but was harmless error because limiting instruction was given).

In this case, the exclusion of the fact of settlement was erroneous and prejudicial because it misled the jury and enabled the settling parties to bolster each other's credibility while maintaining a ruse that they were

adversaries. When the Wuths revealed that they were only pursuing one narrow theory of liability against Dr. Harding (their primary physician responsible for ordering the FISH test that was never ordered), the jury was lulled into a false belief that Dr. Harding must not be culpable and, therefore, that LabCorp and Valley must be the ones who should pay.

The undated secret settlement was a game-changer that placed LabCorp in an unfair strategic disadvantage at the expense of the primary tortfeasor, Dr. Harding, who was then unfairly shielded from liability in accordance with the Wuth family's side arrangement. In addition, the jury was unable to assess the credibility of Dr. Harding or the Wuths – and their credibility (including bias and prejudice) was a central component to this case – without knowing why these adverse parties were acting in concert. Telling a jury that there was a settlement agreement between the main parties fundamentally differs from telling a jury the amount of settlement (which implicates the collateral source rule), with the former being imperative to the jury's assessment of the parties, determination of fault, and assessment of damages. The withholding of this information from the jury infected the trial, and prejudiced LabCorp.

2. Damages Awarded By The Jury Constitute Impermissible Punitive Damages

a) Washington Public Policy Prohibits the Imposition of Compensatory Damages to Deter

"Since its earliest decisions, [our Supreme] court has consistently disapproved punitive damages as contrary to public policy." *Dailey v. N. Coast Life Ins. Co.*, 129 Wn.2d 572, 575, 919 P.2d 589 (1996) (citing *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 50-56, 25 P. 1072 (1891)). "In those instances where punitive damages are authorized by statute, they serve not to compensate the plaintiff but to punish and deter the defendant and others from such conduct in the future." *Id.*

It is well-settled that jury verdicts in cases such as this one that do not involve punitive damages "must be compensatory of a pecuniary loss." *Adams v. State*, 71 Wn.2d 414, 432, 429 P.2d 109 (1967). Arguments to the jury to "make sure this never happens again" constitute improper requests for punitive damages. *See Broyles v. Thurston County*, 147 Wn. App. 409, 445, 195 P.3d 985 (2008) (improper to ask the jury to "award that [sum] so that what will happen to these women will never happen again"). The impact of such improper appeals made during closing arguments is significant, given the "last heard longest remembered" principle. *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 141, 750 P.2d 1257 (1988).

b) Deterrence Was Interjected into this Case Over LabCorp's Objections

Before trial, the trial court alerted counsel that arguments about deterrence would not be allowed. RP 10/24/13, at 193.[40] The trial court warned: "if there's specific reference to these defendants and deterring these defendants, then I'm going to sustain objections . . ." RP 10/24/13, at 199. Then, before the Wuth family's counsel began his closing arguments, LabCorp's counsel asked the trial court for "a standing objection on the deterrence issue." RP 5254-55. After initially responding, "I think I have already sustained your objection," the trial court offered the following distinction: "you can't tell the jury basically to enter a verdict to deter these defendants and to send a message. That's the line I drew. Policy argument only." RP 5254-55.[41]

After hearing this, the Wuth family's counsel expressly urged jurors to award general damages to the Wuths to compensate *and deter*. RP 5308 ("I will tell you why [you should award the damages requested]. Remember the public policies in this case: Compensation and deterrence."). LabCorp objected and the trial court agreed, sustaining the objection and admonishing the Wuth family's counsel to "[b]e careful

[40]RP 10/24/13, at 196, 198, 199 (prohibiting "send a message" and "teach a lesson" arguments); RP 10/24/13, at 422; CP 10174 (prohibiting argument that "jurors place themselves in position of plaintiffs").
[41] CP 11714 (standing objection granted); RP 1/24/14 at 51 (same).

here." RP 5308. Then Dr. Harding's counsel went on to tell the jury that deterrence was the very purpose of damages, even suggesting that deterrence should be considered in an assessment of damages against LabCorp and Valley. RP 5381.[42] LabCorp objected again, and the trial court agreed. RP 5383[43]; 5388 (The Court: "That's a line that, unfortunately, [Dr. Harding's counsel] walked over ...."). The remedy crafted by the trial court, over objections from LabCorp[44] and the Wuth family[45] was a confusing instruction in which the trial court emphasized deterrence and explained its appropriate role:

> THE COURT: Be seated, everybody. All right, ladies and gentlemen. Let's chat for a minute about damages and the policies of the civil law system. ... [I]t's appropriate for the parties to talk to you about what those policies may be that support our civil tort system. What's not appropriate is for you to award damages in this case to deter these specific defendants or to send some sort of message. ... There's a difference between what the purposes -- what the reasons that support our civil legal system are and what you are to do if you find the damages are appropriate here, which is to assess what is appropriate for compensation.

RP 5388-89. After this, the Wuth family's counsel elaborated on the deterrence in his rebuttal closing argument, ("Let me make clear where

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[42] Dr. Harding's counsel said: "[The Wuth family's counsel] talked about the purpose of damages, for compensation and deterrence. He talked about some of the reasons for deterrence. My point is they're simply -- those reasons do not apply to Dr. Harding." RP 5381.

[43] "[LabCorp's counsel]: Your Honor, we just heard argument that deterrence is part of damages, and that is not the case, Your Honor. We would request a curative instruction, because this jury's now been told that deterrence is part of damages."

[44] RP 5383-84.

[45] RP 5385.

deterrence fits in this."). RP 5417. This is the last thing the jury heard before deliberating and returning a verdict of $50 million.[46]

c) Discussions About Deterrence Encouraged the Jury to Award Punitive Damages

Where, as here, the cumulative effect of repeated prejudicial conduct is so pervasive that no instruction or series of instructions could cure it, a new trial is required. *See Aluminum Co. of America v. Aetna Casualty & Surety Co.,* 140 Wn.2d 517, 539, 998 P.2d 856 (2000); *State v. Torres*, 16 Wn. App. 254, 263, 554 P.2d 1069 (1976). To the extent that public policy statements can even be made to a jury by the judge, any such statement must, at a minimum, be helpful to the interpretation of a specific law that is before the jury.[47] The critical distinction between permissible compensatory damages and prohibited punitive damages is that the former makes the plaintiff whole, while the latter awards the plaintiff with excess sums beyond full compensation. *Kadoranian by Peach v. Bellingham Police Dept.*, 119 Wn.2d 178, 188, 829 P.2d 1061 (1992); *see Barr v. Interbay Citizens Bank*, 96 Wn.2d 692, 699-700, 635 P.2d 441 (1981).

In this case, the Wuth family and Dr. Harding actively promoted consideration of deterrence, even making deterrence a central theme to

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[46] The trial court declined to order new trial based upon the improper use of deterrence. *See* CP 11767-75, 11931, 13202, 14192-207, 14209-11.

[47] *See Tiegs v. Boise Cascade Corp.*, 83 Wn. App. 411, 420, 922 P.2d 115 (1996) (concluding that it was not error for a jury to consider legislative policy statements that were helpful in interpreting legislation).

their cases against LabCorp and Valley. The prejudice caused by these improper statements was actually amplified by the trial court's own explanation of deterrence in the midst of closing arguments. It is telling that the Wuth family's counsel and Dr. Harding's counsel – both experienced trial lawyers – misjudged where "the line" was and, consequently, crossed it during their respective closing arguments. RP 5308, 5388. Even the trial judge's own explanations to the jury during jury selection and closing arguments represented that deterrence had a proper role in this case as part of the "civil law system." RP 5388-89.

The unmistakable end result was a message that the jury can (and should) award damages beyond the compensatory damages evidence to deter the future conduct of LabCorp and Valley. The only possible explanation for the jury's $50 million damages award was for an improper deterrence purpose, *i.e.*, to punish LabCorp and Valley and award the Wuth family sums in excess of full compensation, *i.e.*, punitive damages that violate Washington public policy. Where, as here, counsel's closing argument, coupled with the trial judge's comments, undermined the efficacy of the jury instructions, reversal is the appropriate remedy. *See*

Capers v. Bon Marche, Div. of Allied Stores, 91 Wn. App. 138, 145, 955 P.2d 822 (1998).[48]

3. Prejudicial Trial Errors Necessitate a New Trial

LabCorp has a constitutional right to put on a defense: "No person shall be deprived of life, liberty, or property, without due process of law." Wash. Const. art. I, § 3; U.S. Const. amend. XIV, § 1. LabCorp also has a constitutional right to have its case decided by a jury: "The right of trial by jury shall remain inviolate[.]" Wash. Const. art. I, § 21; RCW 7.06.070; CR 38(a). A new trial is warranted in instances of "[i]rregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial." CR 59(a)(1). As set forth above, the trial court committed the following errors, each of which caused substantial prejudice to LabCorp:

- Excluding expert testimony of Dr. London and Dr. Clark and prohibiting LabCorp from telling a jury about Dr. Harding's breaches of the standard of care;
- Refusing to allow LabCorp to exercise its right to seek allocation of fault to Dr. Harding after the Wuth family (which had settled) opted to

[48] This Court's recent opinion in *Miller v. Kenny*, 180 Wn. App. 772, 325 P.3d 278 (2014), does not lead to a different result here because (1) *Miller* involved attorney misconduct and did not involve punitive damages or deterrence, (2) the range of appropriate arguments to be made in the insurance bad faith dispute at issue in *Miller* involve fair dealing with the public, and (2) there was no contemporaneous objection to preserve the issue in *Miller*.

abandon those theories, as memorialized in erroneous jury instructions;

- Offering gratuitous praise of the Wuths that elevated their credibility;
- Hiding from the jury charged with assessing credibility the fact that the Wuth family and Dr. Harding, who were ostensibly adverse, had entered into a cooperative settlement agreement; and
- Allowing the Wuth family's counsel and Dr. Harding's counsel to urge the jury to factor deterrence into its compensatory damages award.

Where, as here, a party was deprived of its right to defend itself and its right to have factual issues decided by a jury, these errors and the other errors set forth herein and in Valley's opening brief infected the entire trial, thereby necessitating reversal for reasons independent of the reasons set forth in part IV.B., *infra*. Although any one of the issues raised above warrants a remand for a new trial, a new trial can also be ordered based upon the cumulative effect of numerous prejudicial errors. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, *clarified*, 123 Wn.2d 737, 870 P.2d 964 (1994); *State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981 (1998). To the extent that the Wuth family's wrongful birth and wrongful life claims are deemed to be actionable, a remand is required for a new trial.

E. LabCorp Joins in the Arguments Detailed in Valley's Brief

In order to avoid the presentation of duplicative briefing and argument to this Court, LabCorp joins in and adopts the arguments set forth in Valley's opening brief at Parts V.B.2. (objective symptomatology), V.B.3 (improper damages), V.C.2. (jury selection), V.C.3. (evidence of extended family members). *See* RAP 10.1(g). If a new trial is ordered for any reason, a new trial is required for LabCorp and Valley to ensure that a jury can determine the intertwined liability and damages issues and determine a proper allocation of fault, if any.

V. CONCLUSION

This case is not *Harbeson*: it is not 1983 and Oliver's disabilities were not caused by LabCorp or any defendant. It is not possible for the Wuths to prove that their son Oliver is more trouble than he is worth, as it is simply not possible to quantify the emotional benefits of Oliver being born, as is required to offset their emotional hardships. Although there is no dispute that Oliver has extraordinary needs, it is similarly not possible to grasp the concept, let alone prove, that Oliver himself would have been better off if he had never been born.

In the event this Court determines that some part of these claims should proceed to trial, a remand is required so that a jury can do its job with legitimacy based upon what actually happened, considering the

context of each party's testimony and admissible expert opinions of wrongdoing that were developed in this case. The verdict rendered by the jury in this case — which considered only selective information based upon skewed presentations, absent context necessary to assess the credibility of witnesses, all the while thinking about the appropriate role of deterrence – that blamed the lab and the clinic for the treating physician's failures can only be described as an uninformed and unintended verdict. LabCorp respectfully urges this Court to reverse and dismiss or, in the alternative, reverse and remand for a new trial.

RESPECTFULLY SUBMITTED this 19th day of September, 2014.

COZEN O'CONNOR

By: _____
Melissa O'Loughlin White, WSBA #27668
mwhite@cozen.com
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Anthony A. Todaro, WSBA #30391
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Attorneys for Defendants-Appellants
Laboratory Corporation of America,
Dynacare Laboratories, Inc., and Dynacare
Northwest, Inc.

DECLARATION OF SERVICE

The undersigned states:

I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of 18 years, I am not a party to this action, and I am competent to be a witness herein.

On this 19th day of September, 2014, I caused to be filed the foregoing Appellant LabCorp's Opening Brief with the Court of Appeals, Division I. I also served a copy of said document on the following parties as indicated below:

Counsel for Plaintiffs-Respondents: Todd W. Gardner Peter E. Meyers Swanson Gardner PLLC 4512 Talbot Road South Renton, WA 98055 todd@swansongardner.com peter@swansongardner.com denise@swansongardner.com	[X] U.S. Mail [X] Email [ ] Legal Messenger
Counsel for Plaintiffs-Respondents: Howard M. Goodfriend Catherine W. Smith Smith Goodfriend, P.S. 1619 8th Avenue North Seattle, WA 98109 howard@washingtonappeals.com cate@washingtonappeals.com taraf@washingtonappeals.com	[X] U.S. Mail [X] Email [ ] Legal Messenger

Counsel for Defendants-Respondents Harding and Obstetrix: Mary K. McIntyre Amy K. Robles McIntyre & Barnes, PLLC 2505 Third Avenue, Suite 202 Seattle, WA 98121 marym@mcblegal.com amyr@mcblegal.com lesleya@mcblegal.com mspillane@williamskastner.com	[X] U.S. Mail [X] Email [ ] Legal Messenger
Counsel for Defendant-Appellant Valley Medical Center: Sherry H. Rogers Craig L. McIvor Melinda R. Drogseth Lee Smart, PS, Inc. 701 Pike Street, Suite 1800 Seattle, WA 98101 shr@leesmart.com clmc@leesmart.com mrd@leesmart.com jlm@leesmart.com mad@leesmart.com and Roger A. Leishman Steven P. Caplow Davis Wright Tremaine LLP 1201 Third Avenue, Suite 2200 Seattle, WA 98101 stevencaplow@dwt.com rogerleishman@dwt.com crystalmoore@dwt.com	[X] U.S. Mail [X] Email [ ] Legal Messenger [X] U.S. Mail [X] Email [ ] Legal Messenger

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

Executed at Seattle, Washington, this 19th day of September, 2014.

Dava Bowzer

DYNACARE LABORATORIES
A Wholly Owned Subsidiary of Laboratory Corporation of America®

550 17th Ave., Suite #300
Seattle, WA 98122
(206) 861-7000 • (800) 979-6033

COURIER PICKUP: (206) 861-7220 SUPPLIES FAX: (253) 872-6340

930756819

365-172-6005-0

12/31/2007

WUTH,RHEA K
DOB 11/23/77 30Y F MFM
FINKLE-WEAVER,CEDA 12/31/07
07362-00265 0002-030742

☐ STAT: 6005
☐ LAB DI 172
☐ CALL:

☒ FAX RESULTS TO: 425-654-5363

NAME 930756819
NAME 930756819
NAME 930756819
NAME 930756819

86682BL 01/07

PATIENT SOCIAL SECURITY NUMBER | PATIENT ID / SSN
PHONE | SEX | BIRTHDATE
COLLECTION DATE/TIME | Fast ☐ Y ☐ N | Urine 24 hrs. vol. | ☐ PRE-OP
12-31-07 ____ Hrs. pp

BILL TO: ☐ CLIENT/CLINIC ☐ PATIENT ☐ MEDICARE ☐ MEDICAID ☒ INSURANCE
INSURANCE COMPANY NAME AND ADDRESS
CITY STATE ZIP
INSURANCE / SUBSCRIBER ID # | SUBSCRIBER NAME / RESPONSIBLE PARTY
INSURANCE / GROUP # | MEDICARE # ☐ PRIMARY ☐ SECONDARY
EMPLOYER | MEDICAID (Coupon or ID No. including DOB)
CITY STATE ZIP
NPI/UPIN | WORKER'S COMP ☐ YES ☐ NO

MEDICARE ADVANCE BENEFICIARY NOTICE: ABN
Use a separate ABN when ordering tests which require an ABN. Refer to the back of this form for more information.
θ = Subject to Medicare medical necessity guidelines % = Subject to Medicare frequency guidelines

VALLEY MEDICAL MATERNAL FETAL MEDICINE CLINIC

[ ] 40349 JOSIE AMORY,MD
[ ] 38581 BRIGIT BROCK, MD
[ ] 39399 SAMEER GOPALANI, MD
[ ] 38584 DAVID GORENBERG, MD
[ ] 38580 JAMES HARDING, MD
[ ] 39096 DAVID LUTHY, MD
[ ] 38582 DALE REISNER, MD
[ ] 39095 SUSAN E RUTHERFORD, MD
[ ] 38583 TANYA SORENSEN, MD
[ ] 41145 LAN T TRAN, MD

ADDITIONAL REPORT TO:

rec'd 12/31/07 3pm BW
IBFT-villi

ICD-9 Codes (Highest Specificity)
1. ____
2. ____
3. ____
4. ____

I hereby authorize the release of medical information related to the service described herein and authorize payment directly to LabCorp. I agree to assume responsibility for payment of charges for laboratory services that are not covered by my healthcare insurer. X Patient Signature Date

A SPECIMEN TYPE

[ ] AMNIOTIC FLUID – (GESTATIONAL AGE: ____ WKS)
[X] CHORIONIC VILLI – (GESTATIONAL AGE: 12+1 WKS)
[ ] PRODUCTS OF CONCEPTION – (GESTATIONAL AGE: ____ WKS)
[ ] PERIPHERAL BLOOD
[ ] FETAL BLOOD (PUBS)*

B CLINICAL INDICATIONS/FAMILY HISTORY

DIAGNOSIS: ____ ICD-9 CODE: ____
[ ] ADVANCED MATERNAL AGE
[ ] ABNORMAL ULTRASOUND
[ ] ABNORMAL AFP/HCG/UE3
[ ] MULTIPLE SPONTANEOUS ABORTIONS
G ____ P ____ SAB ____ TOP ____
[ ] CONGENITAL ABNORMALITIES (SPECIFY) ____
[X] FAMILY HX OF CHROMOSOME ABNORMALITY (SPECIFY) ____
[X] FAMILY HX OF GENETIC DISORDER (PLEASE ATTACH PEDIGREE WHEN REVELANT): Hx / Translocation Unbalanced

C CYTOGENETICS

[ ] CAAF CHROMOSOME ANALYSIS, AMNIOTIC@%
[X] CACVILLI CHROMOSOME ANALYSIS, CHORIONIC VILLI@%
TRANSCERVICAL OR TRANSABDOMINAL
[ ] CASKIN CHROMOSOME ANALYSIS, POC/SKIN@%
[ ] CONFINED PLACENTAL MOSAICISM@%
[ ] CAPBC CHROMOSOME ANALYSIS, BLOOD COMP(20 CELL)@%
[ ] CAPBM CHROMOSOME ANALYSIS, BLOOD MINI(5 CELL)@% (TO CONFIRM PREVIOUS RESULT)
[ ] CAPBMO CHROMOSOME ANALYSIS, BLOOD MOSAIC(30 CELL)@%
[ ] CAFRX CHROMOSOME ANALYSIS/DNA FRAGILE X, BLOOD@%
[ ] CAHR CHROMOSOME ANALYSIS, BLOOD HIGH RESOLUTION@%

[ ] FLOURESCENT IN SITU HYBRIDIZAIONT (FISH)
[ ] INTERPHASE FISH [ ] AMNIOTIC FLUID [ ] BLOOD [ ] CVS
[ ] PRENATAL ANEUPLOID SCREEN (13,18,21,X,Y)@%
[ ] OTHER PROBE: ____ @%
[ ] METAPHASE FISH PROBE: ____ @% [ ] FISH OTHER: ____ @%

CHEMISTRY

[X] AFPA AFP, AMNIOTIC
[ ] ACHE, ACETYLCHOLINESTERASE

DOB 11-23-77

DATE IF 1ST DAY OF LMP: ____

GESTATION AGE AT TIME OF ULTRASOUND (WEEKS/DAYS): 12+1

DATE OF ULTRASOUND DONE: 12-31-07

SPECIALIZED TEST(S) REQUESTED: ____

CPT CODES: ____

SAMPLE REQUIREMENTS: ____

SEND TO: ____
LAB: ____
ADDRESS: ____
PHONE: ____

LAB: ____
ADDRESS: ____
PHONE: ____

[ ] CHECK IF PAPERWORK TO BE SENT WITH SAMPLE.

SST	PR	Red	Lav	Gray	Blue	Green	PST	FZ	UA	Cult	Gen	Vir	Tiss	PAP	Stool	Other

* Confirmation at additional charge
+ Time, urine micro, ID/Susceptibility at additional charge

LABCORP-WUTH-00014

Appendix A

LabCorp
Laboratory Corporation of America
DYNACARE LABORATORIES

Valley Med Maternal Fetal Med

4033 Talbot Rd S Ste 450
RENTON, WA 98055
Ph: (425)656-5520
Fax: (425) 656-5363 WAB-55

LCLS Specimen Number: **365-172-6005-0**
Patient Name: **WUTH, RHEA K**
Date of Birth: 11/23/1977
Gender: F
Patient ID: 536111339
Lab Number: (J07-7734 V
Indications: HX UNBALANCED TRANSLOCATION

Account Number: 46870020
Ordering Physician: **J HARDING**
Specimen Type: **CHORIONIC VILLI**
Date Collected: 12/31/2007
Date Received: 12/31/2007
CoPath Number:
Client Reference:

Test: **Chromosome, CVS**

Date Reported: **01/07/2008**

Cells Counted: 15
Cells Analyzed: 5

Cells Karyotyped: 2
Band Resolution: 550

CYTOGENETIC RESULT: 46,XY

INTERPRETATION: NORMAL MALE KARYOTYPE

Cytogenetic analysis of cultured chorionic villi revealed a MALE karyotype with an apparently normal banding pattern in all metaphases examined.

This result does not exclude the possibility of subtle rearrangements below the resolution of cytogenetics or congenital anomalies due to other etiologies.

LabCorp
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Valley Med Maternal Fetal Med

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Date Collected: 12/31/2007
Date Received: 12/31/2007
CoPath Number:
Client Reference:

Karyotype: 46,XY

Frederick W. Luthardt PhD, FACMG
Board Certified Cytogeneticist

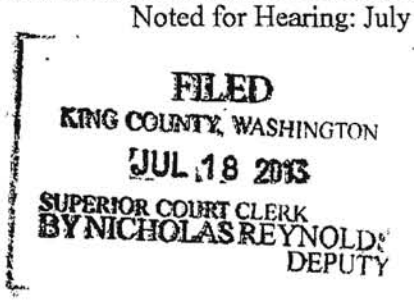
David Corwin, M.D.
Medical Director
Peter Papenhausen, PhD
National Director of Cytogenetics

Test Site: Dynacare Laboratories
550 17th Ave. Suite 200 , SEATTLE , WA , 98122-5789 (206) 861-7050

LABCORP-WUTH-00007

Appendix B

THE HONORABLE LEROY McCULLOUGH
Noted for Hearing: July 12, 2013



SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

OLIVER L. WUTH, a minor, by and through his Guardian Ad Litem KEITH L. KESSLER; and BROCK M. WUTH and RHEA K. WUTH, husband and wife,

Plaintiffs,

v.

LABORATORY CORPORATION OF AMERICA, a foreign corporation; DYNACARE NORTHWEST, INC., a domestic corporation, d/b/a DYNACARE LABORATORIES, INC., a domestic corporation; JAMES A. HARDING, M.D.; OBSTETRIX MEDICAL GROUP OF WASHINGTON, INC., P.S., a domestic corporation; and KING COUNTY PUBLIC HOSPITAL DISTRICT NO. 1, d/b/a VALLEY MEDICAL CENTER,

Defendants.

No. 10-2-43289-2 KNT

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS JAMES HARDING, M.D., AND OBSTETRIX MEDICAL GROUP OF WASHINGTON, INC., P.S.'S MOTION FOR PARTIAL SUMMARY JUDGMENT

~~[PROPOSED]~~

THIS MATTER having come before the undersigned Judge on Defendants James A. Harding, M.D., and Obstetrix Medical Group of Washington, Inc., P.S.'s (collectively, "Dr. Harding") Motion for Partial Summary Judgment, and the Court having considered the materials filed on this issue and the pleadings in this matter, and being fully advised;

CORR CRONIN MICHELSON BAUMGARDNER & PREECE LLP
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Tel (206) 625-8600
Fax (206) 625-0900

It is hereby ORDERED that Defendant Dr. Harding's Motion for Partial Summary Judgment is GRANTED IN PART and DENIED IN PART as set forth below.

1. That aspect of Dr. Harding's motion that seeks to dismiss Plaintiffs' informed consent claim is GRANTED.

2. That aspect of Dr. Harding's motion that seeks to limit the "claims" against ~~him~~ "to the issue of whether he asked the medical assistant to sent Mr. Wuth's genetic test report to LabCorp" is DENIED, except that summary judgment is granted dismissing the claim that Dr. Harding was negligent for failing to order a FISH test based solely on a statement by Rhea Wuth that a FISH test would be needed. ~~The parties will be permitted to present any evidence relevant to Dr. Harding's alleged negligence that has not previously been excluded by an Order of this Court.~~

3. Dr. Harding's motion to strike is granted as to Dr. London and denied as to all other experts.

4. LabCorp may seek reconsideration within 10 days of this order.

IT IS SO ORDERED.

Dated this 18th day of July, 2013.

HON. LEROY McCULLOUGH

APPROVED AS TO FORM

DAN VON SEGGERN, WSBA # 39239
ATTORNEY FOR VALLEY MEDICAL CENTER

Approved as to form
Mary Nastiuk
attorney for Dr. Harding #13829

Presented by:

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP

Anthony A. Todaro, WSBA No. 30391
Kelly H. Sheridan, WSBA No. 44746

Attorneys for Defendants LabCorp

Approved as to form
PETER E. MEYERS
#12738
For TT

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Tel (206) 625-8600
Fax (206) 625-0900

FILED
KING COUNTY, WASHINGTON
OCT 14 2013
SUPERIOR COURT CLERK
BY LISA ROQUE DEPUTY

Honorable Leroy McCullough
Trial: 10/21/13

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

OLIVER L. WUTH, a minor, by and through his Guardian Ad Litem KEITH L. KESSLER; and BROCK M. WUTH and RHEA K. WUTH, husband and wife, Plaintiffs, vs. LABORATORY CORPORATION OF AMERICA, a foreign corporation; DYNACARE NORTHWEST, INC., a domestic corporation, d/b/a DYNACARE LABORATORIES, INC., a domestic corporation; JAMES A. HARDING, M.D.; and OBSTETRIX MEDICAL GROUP OF WASHINGTON, INC., P.S., a domestic corporation; KING COUNTY PUBLIC HOSPITAL DISTRICT NO. 1, d/b/a VALLEY MEDICAL CENTER Defendants.	NO. 10-2-43289-2 KNT ~~[PROPOSED]~~ ~~4~~ **ORDER DENYING LABCORP'S MOTION FOR RECONSIDERATION OF THE COURT'S JULY 18, 2013 ORDER**

This matter, having come upon hearing of Labcorp's Motion for Reconsideration of the Court's July 18, 2013 Order and the Court having considered the following evidence:

1. Labcorp's Motion for Reconsideration of the Court's July 18, 2013 Order;

McIntyre & Barns, PLLC
2505 Third Ave., Ste. 202
Seattle, WA 98121
(206) 682-8285

ORIGINAL

Appendix C

2. Declaration of Anthony Todaro with the following exhibits:

Exhibit A: Court's July 18, 2013 Order;

Exhibit B: Excerpts of the deposition of Rhea Wuth taken on November 9, 2012;

Exhibit C: Excerpts of the deposition of Robin D. Clark, M.D., taken on December 19, 2012;

Exhibit D: Excerpts of the deposition of Brock Wuth taken on November 9, 2012;

Exhibit E: CV of Andrew London, M.D.; and

Exhibit F: Excerpts of the deposition of Andrew London, M.D., taken on November 14, 2012.

3. Defendants James A. Harding, M.D. and Obstetrix Medical Group of Washington, Inc., P.S.'s Response to Labcorp's Motion for Reconsideration of the Court's July 18, 2013 Order;

4. Declaration of Mary K. McIntyre with the following attached exhibits:

Exhibit 1, Excerpts from Rhea Wuth's deposition;

Exhibit 2, Declaration of Dr. James Harding;

Exhibit 3, Excerpts from Brock Wuth's deposition;

Exhibit 4, Harding Reply/Motion to Strike;

Exhibit 5, Harding Motion in Limine to Exclude Testimony by Dr. London;

Exhibit 6, Excerpts from Dr. London's deposition;

Exhibit 7, Test results;

Exhibit 8, Dr. Harding's letter to Dr. Martin;

Exhibit 9, Excerpts from Dr. Burton's deposition;

Exhibit 10, Excerpts from Dr. Incerpi's deposition;

Exhibit 11, Excerpts from Dr. Gargus' deposition;

Exhibit 12, Excerpts from Dr. Curry's deposition;

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Seattle, WA 98121
(206) 682-8285

Exhibit 13, Excerpts from Dr. Lamb's deposition;

Exhibit 14, Excerpts from Dr. Blake's deposition;

Exhibit 15, LabCorp Total Quality Management Program;

Exhibit 16, LabCorp test report;

Exhibit 17, Excerpts from E. Starkey's deposition;

Exhibit 18, Excerpts from Dr. Harding's deposition;

Exhibit 19, Dr. Harding's CV; and

Exhibit 20, Advertisement for A. London, MD.

5. And the precise language of the 18 July 2013 Order

It is now hereby ORDERED:

1. Labcorp's Motion for Reconsideration of the Court's July 18, 2013 Order is DENIED.

2. No Reply is mandated by the Local Court Rules and none is appropriate here.

DONE IN OPEN COURT this 14th day of October, 2013.

Honorable LeRoy McCullough

Presented by:

McINTYRE & BARNS

Response of record

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prior Order
of Record
July 18, 2013
and subsequent
Submittals

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