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No. 71497-0-I
(Consolidated with Nos. 71498-8-I and 71553-4-I)

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

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

Respondents,

v.

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

Appellants,

and

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

Respondents.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
HONORABLE CATHERINE SHAFFER

BRIEF OF APPELLANT VALLEY MEDICAL CENTER

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Defendant Valley Medical Center faces an unprecedented $50,000,000 verdict that improperly includes amounts for both "compensation ***as well as deterrence***." (Plaintiffs' closing argument, RP 5287:12.) Plaintiffs Rhea and Brock Wuth came to Valley to provide a fetal tissue sample, which an independent laboratory tested for an inherited genetic abnormality. As the jury's verdict confirmed, the level and quality of care provided by Valley's agents during the procedure satisfied the applicable standard of care. Nevertheless, the Wuths successfully argued Valley should have gone ***beyond*** the standard of care by adding a genetic counselor to the treatment team. After hearing inflammatory and unfounded accusations of corporate greed, the jury reached a verdict exceeding even the substantial amounts the Wuths and their son Oliver requested based on worst-case speculation rather than medical evidence. The Court should correct these errors and remand for dismissal or a new trial for at least four independent reasons:

First, the trial court erred as a matter of law by allowing novel claims for hospital corporate liability that required the judge to diverge from the pattern jury instruction. Valley was substantially prejudiced by cumulative and ultimately unanswerable accusations that the hospital's budgeting and resource-allocation processes could be considered the legal

cause of Oliver Wuth's inherited disability. The hospital corporate negligence doctrine exists so plaintiffs may assert claims directly against hospitals in specific circumstances where the unique role of physician independent contractors would otherwise bar any recovery. Here, however, the Wuths challenged specific actions by identified agents of LabCorp and Valley; there was no need to apply—let alone expand—the corporate negligence doctrine. As the trial court belatedly recognized, the impact of the Wuths' open-ended approach to the hospital corporate negligence doctrine is to impose "strict liability" on hospitals, in violation of Washington law. RP (1/17/14) 9:18-19.[1]

Second, the court erroneously expanded Washington's compensatory "wrongful life" and "wrongful birth" doctrines to allow millions of dollars in speculative damages. Unlike the defendants in *Harbeson v. Parke-Davis*, 98 Wn.2d 460, 476-77, 656 P.2d 483 (1983), which authorized claims against health care providers who prescribed drugs that increased risk of serious birth defects, these defendants did not cause Oliver's condition. Further, Oliver's prognosis and functioning compare to individuals with Down's syndrome, and his life brings joy to himself, his parents, and others. Nevertheless, the court improperly

[1] Citations to the consecutively-numbered portions of the trial transcript are to "RP page #:line #." Because some court reporters used duplicate pagination, citations to other portions of the report of proceedings also include the hearing date.

awarded $25 million to Rhea and Brock Wuth solely for the emotional distress of raising a disabled child, even though they failed to offer the evidence of objective symptomology required for negligence claims. This Court should reverse the judgment, and clarify the proper limits on the *Harbeson* doctrine and its applicability to corporate negligence claims.

Third, the record-breaking $50 million judgment is excessive and based on improper considerations. The trial court erred during voir dire by "death qualifying" the jury pool on the subject of abortion, as if they were hearing a capital punishment case. At trial the jurors heard unduly prejudicial testimony and argument about Wuth family members' medical conditions. The Wuths also improperly—and successfully—requested deterrence damages. In light of these improper arguments, it is unsurprising that the verdict was millions of dollars more than the Wuths themselves requested. RP 5287:24-25 ("you can't award him a dime more").

Finally, the trial court erred as matter of law by ruling on summary judgment that genetic counselor Elizabeth Starkey—a Swedish Hospital employee—was Valley's apparent agent.

The Court should reverse and remand for entry of judgment in favor of Valley. In the alternative, Valley asks the Court to remand for a new trial.

II. ASSIGNMENTS OF ERROR

1. The court erred in denying summary judgment or judgment as a matter of law on the Wuths' hospital corporate negligence claims. (Sub nos. 518B, 715, CP 4959, 14212).

2. The court erred in determining on summary judgment that Swedish Hospital employee Elizabeth Starkey was Valley's apparent agent. (Sub no. 103, CP 1111).

3. The court erred in denying summary judgment on the Wuths' *Harbeson* claims. (Sub nos. 177E, 518A, CP 2248, 4955-57).

4. The court erred in applying a "death qualification" standard to jurors' opinions regarding abortion. (*See, e.g.*, CP 12069-72, 8710-11).

5. The court erred in the following evidentiary rulings: (a) "binding" Valley to testimony elicited in CR 30(b)(6) depositions (*see, e.g.*, CP 10815); (b) repeatedly admitting photographic, video, and other evidence regarding diagnoses and development of Oliver's relatives (*see, e.g.*, CP 10170-71); (c) excluding the Wuth's secret settlement agreement with Dr. Harding (*see, e.g.*, CP 10172); and (d) permitting counsel to argue for deterrent damages (*see, e.g.*, CP 8804).

6. The court erred in giving the following jury instructions: (a) Instr. No. 6 (CP 11607-09); and (b) Instr. No. 12 (CP 11615).

7. The court erred in entering its judgment against Valley.

(Sub no. 751, CP 11759-61).

8. The court erred in denying Valley's and LabCorp's motions for a new trial. (Sub no. 806, CP 14209-11).

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Did the trial court improperly expand the scope of Washington's hospital corporate negligence doctrine?

2. Did Rhea and Brock Wuth fail to establish a valid wrongful birth claim?

3. Did Oliver Wuth fail to establish a valid wrongful life claim?

4. Did the Wuths fail to present substantial evidence supporting the damage award?

5. Did the Wuths improperly argue for damages with a punitive or deterrent purpose?

6. Did the trial court err by "death qualifying" the jury pool on the subject of abortion?

7. Was the repeated admission of graphic evidence regarding other children with other medical conditions in violation of ER 705 unduly prejudicial?

8. Did the trial court err by summarily determining that Swedish Hospital employee Elizabeth Starkey was Valley's apparent agent?

9. Did the trial court improperly exclude references to Dr. Harding's settlement agreement with the Wuths?

IV. STATEMENT OF THE CASE

A. Valley Medical Center's Maternal Fetal Medicine Clinic

Defendant King County Public Hospital Dist. No. 1, d/b/a Valley Medical Center, was the first public hospital district in Washington. RP 551:1-18. In 2004, Valley established the Maternal Fetal Medicine Clinic ("Clinic"). RP 552:5-6. Dr. Harding and other doctors provided care to patients at the Clinic under a Staffing Agreement between Valley and their employer, Obstetrix Medical Group, Inc. CP 889:7-20, CP 977-82; RP 2354:4-20.

Valley itself employed other Clinic staff, including medical assistants, schedulers, technicians, and genetic counselors. *Id.*; *see also* RP 457:19-23, RP 905:22-24. In December 2007, the Clinic's regular genetic counselor was out on maternity leave. Despite Valley's efforts to locate additional coverage during her leave, it could only obtain a counselor borrowed from Swedish Hospital one day a week. CP 617:3-5, CP 7060:3-14.

B. Brock Wuth carries a genetic alteration

Each person has 46 chromosomes in 23 pairs. RP 939:2-4. An ancestor of Brock Wuth had genetic material at the ends of chromosomes 2 and 9 that changed places. RP 945:2-5. This exchange of genetic material between two chromosomes is known as a "translocation." RP

944:18-19. Brock's DNA includes a normal set of chromosomes 2 and 9, and a derivative set of chromosomes 2 and 9. RP 945:7-10. Brock's two derivative chromosomes between them have a full set of genetic material (RP 945:6-7), which is known as a "balanced translocation." RP 946:12-13. A person with a balanced translocation has no symptoms of the condition. RP 945:6-13.

In 2003, Brock's family discovered they were potential carriers of an "unbalanced" translocation. To learn more, his extended family attended a meeting led by doctors at Children's Hospital (RP 1413:9-24), and Wuth family members undertook newly-available cytogenetic testing. RP 577:23-578:8. Testing revealed Brock is a carrier for an unbalanced 2;9 translocation. RP 580:9-11.

The Wuths then received genetic counseling from Darci Sternen at Children's Hospital (RP 582:17-20), who explained the condition, the use of either Chorionic Villus Sampling ("CVS") or amniocentesis to extract fetal genetic samples, and laboratory testing of the fetal genetic sample, including using a process called FISH testing. RP 580:6-17; RP 1844:6-13. The Wuths received a detailed written report explaining the 2;9 translocation, RP 581:8-582:12; CP 1900-02 (Trial Ex. 11), CP 1859-62 (Trial Ex. 12), which they brought to each medical appointment related to Ms. Wuth's pregnancies. RP 583:4-584:1. The Wuths received further

genetic counseling at the Swedish Maternal Fetal Medical Clinic, RP 1899:6-10, and again at Three Tree Women's Clinic, their prenatal care provider. RP 1845:1-15; RP 1899:16-19.

C. Ms. Wuth's CVS procedure satisfied the standard of care

In December 2007, Ms. Wuth's regular physician scheduled an appointment at Valley for a procedure to obtain genetic material that an independent laboratory, LabCorp, would test for the translocation. The appointment was scheduled for December 31, 2007, over the holidays, because the Wuths wanted a CVS procedure. Unlike amniocentesis, CVS can be done only during the first thirteen weeks of pregnancy. RP 804:21-805:5. On the day of her appointment, Ms. Wuth was 12 weeks and one day pregnant. RP 4304:9-15. The CVS procedure was scheduled with Dr. Harding, who specialized in maternal-fetal medicine and serves as an associate clinical professor of obstetrics at the University of Washington. RP 4289:23-4290:1.

The Wuths brought a copy of the Children's report to the appointment and handed it to Dr. Harding. RP 1739:13-19; RP 1896:3-13. Before the procedure, Dr. Harding reviewed the Children's report outside the room, RP 4327:13-17, and then spent about 30 minutes with the Wuths discussing the translocation, the family history of translocations, options for testing, and the procedure. RP 1898:8-23; RP 1900:1-12. After the

procedure, Dr. Harding personally made a copy of the Children's report and handed it to his medical assistant, Cathy Shelton, to send to LabCorp with the tissue sample. RP 4407:19-4408:1. He then stood next to Ms. Shelton and instructed her to write "Family history, unbalanced translocation" on the transmittal paperwork sent to LabCorp. RP 4410:3-11; RP 4410:23-4411:7.

The Wuths eventually limited their claim against Dr. Harding to the assertion that he breached the standard of care if, but only if, he failed to instruct Ms. Shelton to include the Children's report when she completed the form. CP 11607-09. The jury, agreeing with the Wuths' medical experts and crediting the doctor's account, determined Dr. Harding met the standard of care in all respects. *See* RP 483:4-8; RP 697:15-20; RP 725:11-726:12; RP 764:22-765:5; RP 1888:15-1890:13.

D. The Wuths allege subsequent specific conduct by LabCorp and by identified Valley agents caused their injuries

In light of the jury's verdict absolving Dr. Harding, the Wuths' sole remaining claim arises from the defendants' subsequent failure to identify the unbalanced translocation in the fetal specimen sample:

Valley employee Cathy Shelton. The Wuths asked the jury to find Valley liable if Ms. Shelton, in disregard of Dr. Harding's instruction, failed to provide LabCorp with a copy of the Children's report containing

information about the translocation. According to the Wuths, Ms. Shelton (and hence Valley) met the standard of care if she provided the information to LabCorp, but breached the standard of care if she did not. RP 2624:4-8; 2630:23-2631:5.

Ms. Shelton testified that she prepared two standard worksheets to send to LabCorp along with the tissue sample obtained during the CVS procedure. RP 4967:5-10; RP 4971:10-16. Ms. Shelton stated it was her practice to staple documents that were going to the lab to keep them together (RP 4980:19-23), and if there was an additional document furnished by the doctor to be sent to the lab, she would "attach that at the same time." RP 4981:2-5. To avoid misplacing documents, Ms. Shelton would staple them immediately without placing them on her desk, RP 4988:1-10, even if she was still in the middle of completing the form. RP 5066:15-23. Ms. Shelton testified the doctor would tell her which documents to attach to the worksheet (RP 4981:11-16), and that she had been instructed to attach similar materials on prior occasions while working at the Clinic. RP 4981:17-20. Once she collected all the paperwork for the lab, Ms. Shelton would verify the information on the forms and that any additional records were included in the package with the tissue sample. RP 4982:19-4983:3. Dr. Harding had worked with Ms. Shelton for almost four years. He describes her as having "outstanding"

reliability (RP 4418:5-18), one of the "best employees" with whom he has worked (RP 900:13-19), and a person who without exception followed his instructions (RP 901:7-10). Ms. Shelton's supervisor, who was in charge of writing her annual evaluation, testified Ms. Shelton was "excellent," "responsible and accountable," "knew the workings of the maternal-fetal medicine clinic," and did a "phenomenal job." RP 1286:23-1287:7.

LabCorp. The Wuths asked the jury to find LabCorp employees (i) misplaced the Children's report if it was sent by Valley, (ii) failed to contact Valley to obtain the information contained in the Children's report, and (iii) failed to conduct a FISH test to identify the genetic condition. CP 11608. The Wuths contend each of these alleged actions independently breached the standard of care. RP 5282:17-5285:20.

Swedish/Alleged Valley Agent. Elizabeth Starkey, a genetic counselor employed by Swedish, received the test results from LabCorp and notified Ms. Wuth by telephone that the results were normal. The Wuths asked the jury to find Valley liable on the alternative ground that Ms. Starkey, as Valley's apparent agent, should have made "more of an effort" to confirm LabCorp in fact had the information it needed to identify the Wuths' genetic condition. RP 1015:18-22.

E. Oliver was born with an unbalanced translocation

Oliver was born on July 12, 2008. RP 573:12-15. After his birth,

Oliver was diagnosed with an unbalanced 2;9 translocation. RP 1316:24-1317:7. Oliver inherited a normal set of chromosomes from his mother, a derivative chromosome 2 from Brock and a normal chromosome 9 from Brock. RP 946:12-18. As a result, Oliver's expressed genes are missing a fractional amount of chromosome 2 and have three copies (instead of two) of a small piece of chromosome 9. RP 946:19-947:1.

Oliver is "cheerful, friendly, and engaging." RP 2011:21-23. He enjoys music and being read to, and is emotionally connected to members of his family. RP 1635:10-14, RP 1825:24-1826:1. Oliver has difficulty with expressive language and with gross motor skills, and for a period when he was younger he used a walker. RP 1824:12-17, RP 1952:13-18. He puts himself to bed and generally sleeps well. RP 2011:24-2012:8. Oliver has a composite IQ of 85, and scored in the 91st percentile for the IQ subtest involving sequencing. RP 1649:13-22. As a point of reference, children with Down's syndrome typically have an IQ of 55. RP 1654:11-17. Oliver receives special education. RP 1663:23-1664:1. He enjoys school, his friends at school, and taking the school bus unaccompanied. RP 1630:8-20; RP 2817:19-21. When he completes high school, Oliver will be eligible for additional life experience education programs at Bellevue Community College. RP 3528:19-25. Oliver is projected to have some functional independence as an adult, including taking the bus,

living and forming friendships with peers, and attending a workshop or working at a business that hires disabled individuals. RP 3529:1-13; RP 2036:9-12; RP 3062:3-3063:2.

F. The Wuths' lawsuit and addition of corporate negligence claim

On December 15, 2010, the Wuths filed suit against LabCorp and its affiliates and Dr. Harding and his medical group. CP 1-10. On June 28, 2011, the Wuths filed their First Amended Complaint, adding Valley as an additional defendant. CP 29-40. The Wuths identified Dr. Harding and Ms. Shelton as agents of Valley. CP 31. The Wuths originally asserted claims for both medical negligence and failure to obtain informed consent, CP 36-37, but ultimately abandoned the latter. CP 3133-37.

After the close of discovery, the Washington Supreme Court issued a decision in an unrelated case suggesting the Wuths' claims against Valley were subject to the statutory pre-suit filing requirement under RCW 7.70.100(1). *See McDevitt v. Harborview Med. Ctr.*, 291 P.3d 876 (2012). Acknowledging their case against Valley was potentially subject to dismissal because of the failure to comply with these pre-suit notice requirements, the Wuths filed a motion to amend their complaint to add a claim for hospital corporate negligence. CP 1114-27; CP 1128-34. The Wuths represented to Valley and the Court—twice, each time bolded and underlined—"**This amendment will require no additional discovery, no**

additional experts and will compel no additional defenses." CP 1115:9-10, CP 1126:15-16. Over Valley's objection, CP 1474-84, the trial court allowed the amendment. CP 1601-15. However, the Supreme Court later held *McDevitt* applied only prospectively, so its rule and had no effect on the Wuths' claims. 179 Wn.2d 59, 75-76, 316 P.3d 469 (2013).

G. Summary Judgment

LabCorp and Valley moved for summary judgment on the *Harbeson* claims. CP 3489-3512; CP 3636-54. Valley moved for summary judgment on the corporate negligence doctrine. CP 2499-2519. Judge McCullough denied defendants' motions. CP 4955-57; CP 4958-60. The trial court granted several summary judgment motions by the Wuths and Dr. Harding, including ruling as a matter of law that Ms. Starkey and Dr. Harding were Valley's agents. CP 1110-13.

H. Trial

The case was transferred to Judge Catherine Shaffer, who ruled on motions in limine and presided over a four-week jury trial. In her evidentiary rulings, the judge strictly barred Valley's witnesses from offering new testimony on 30(b)(6) topics, RP (10/21/13) 113:6-20, but allowed the Wuths' experts to offer new opinions on these same topics. *See, e.g.,* RP (10/24/13) 244:14-17.

Trial was notable for an extended voir-dire process identifying and eliminating jurors with "pro-life" views. RP (10/21/13) 121:1-22. Throughout the proceedings, Judge Shaffer also expressed her concerns that King County juries had become too miserly, saying 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 (10/24/13) 198:4-7. Despite "real 403 concerns," the court allowed testimony about Valley's budget in support of the Wuths' corporate negligence claim. RP 347:24-351:20. The court even permitted the Wuths' counsel to argue for "deterrence" damages. RP 5257:7-5258:2; RP 5287:10-12, RP 5308:5-7. And despite the Wuths' representations that adding corporate negligence claims would not require additional experts, the court allowed them to introduce new "hospital administration" experts. CP 2681-82. The court also allowed pervasive and prejudicial comparisons between Oliver and an older cousin, Jackie Mills, even though the Wuths' own experts expressly disavowed as scientifically unsound any comparison between Oliver's and Jackie's development. RP 2278:4-25.

The jury returned a $25,000,000 verdict on Oliver's medical claim, CP 11720—millions more than the Wuths requested or the experts opined was medically necessary. CP 11768:1-17, CP 11951:12-11952:7. The jury returned an identical $25,000,000 verdict on Rhea and Brock Wuths'

nonsymptomatic emotional distress claim. CP 11720. The court entered judgment on both verdicts. CP 11759-61.

I. Post-trial proceedings

On December 30, 2013, Valley filed a CR 59 motion for a new trial. CP 11928-57. Valley also joined in LabCorp's CR 59 motion. CP 13144-46. On January 24, 2014, Judge Shaffer denied both motions. CP 14209-11. Valley timely appealed. CP 14237-49.

V. ARGUMENT

A. The Trial Court Misapplied Washington's Hospital Corporate Negligence Doctrine.

Courts apply doctrines of inferred negligence sparingly. Because the Wuths alleged their injuries were the result of identified conduct by agents of each defendant, rather than independent contractors, the trial court erred by expanding the hospital corporate negligence doctrine. This Court applies a de novo standard of review to the trial court's denial of summary judgment. *Greenbank Beach and Boat Club, Inc. v. Bunney*, 168 Wn. App. 517, 522, 280 P.3d 1133 (2012). This Court should reverse the court's orders denying summary judgment and judgment as a matter of law on the Wuths' corporate negligence claims.

1. The hospital corporate negligence doctrine fills a gap in Washington health care law—not present in this case—by imposing an independent duty on hospitals to select and supervise medical staff.

Responding to a crisis in health care and malpractice costs, the Legislature in 1975 enacted a new statute, RCW Chapter 7.70, to limit liability for health care related injuries. *Branom v. State*, 94 Wn. App. 964, 969, 974 P.2d 335 (1999). RCW 7.70 applies to health care provider entities such as Valley and LabCorp, who act through their ***employees*** and ***agents***. RCW 7.70.020(3). However, because of the importance of doctor autonomy and the inviolate patient relationship, hospitals do not control the actions of non-agent ***independent contractor*** physicians, and therefore are not vicariously liable for their conduct. Washington adopted the doctrine of "hospital corporate negligence" as an exception to this general agency rule, thus filling a gap in the health care statute's exclusive remedy provision for patient claims against hospitals. The gap—not present in the Wuths' case because the court determined Valley ***was*** vicariously responsible for each of its agents' acts, including Dr. Harding, CP 1111—occurs only when the treating physician works with the hospital as an independent contractor, freeing the hospital from the prospect of vicarious liability.

"Before the emergence of corporate negligence, hospital liability for the negligence of a staff physician was based on the theory of respondeat superior. Plaintiffs found it difficult to recover, however, as courts tended to classify physicians as independent contractors for whose acts the hospital was not liable." *Pedroza v. Bryant*, 101 Wn.2d 226, 230, 677 P.2d 166 (1984); *see also* Comment, "The Hospital-Physician Relationship: Hospital Responsibility for Malpractice of Physicians," 50 Wash. L. Rev. 385 (1975). Because the health care statute imposes hospital liability only when the institution acts through its employees and agents, but not through independent contractors, RCW 7.70.020(3), this statutory gap can operate to prevent an injured patient from asserting a health care claim against the hospital merely for organizational reasons.

In *Pedroza*, which first recognized the doctrine of hospital corporate negligence under Washington law, the treating physician was "an independent contractor, not an employee of defendant hospital." 101 Wn.2d at 229. The Supreme Court recognized the right of patients in that circumstance to seek redress against the hospital by imposing an independent duty on the hospital to exercise care in granting privileges to nonemployee doctors. Like negligent supervision claims outside the hospital context, "[t]he pertinent inquiry is whether the hospital exercised reasonable care in the granting, renewal, and delineation of staff

privileges. This inquiry focuses on the procedures for granting and renewal of staff privileges set forth in the hospital bylaws." *Id.* at 235. The court's ruling in *Pedroza* imposes on hospital a duty to exercise reasonable care to limit staff privileges to competent physicians.

After *Pedroza*, Washington courts continued to consider a hospital's responsibility to investigate and review the general competence of independent physicians who use its facilities. These decisions explored whether a hospital's duty included a limited obligation to monitor the physician's treatment of patients. In *Schoening v. Grays Harbor Cmty. Hosp.*, 40 Wn. App. 331, 335, 698 P.2d 593 (1985), the court recognized a hospital's duty to "monitor the treatment of its patients and intervene if there is obvious negligence." Because the evidence established the hospital's personnel were "certainly aware" of the patient's "deteriorating condition," the court identified an issue of fact as to whether the hospital should have acted independently of the attending physician. *Id.* at 336. By contrast, in *Alexander v. Gonser*, 42 Wn. App. 234, 711 P.2d 347 (1986), and *Andrews v. Burke*, 55 Wn. App. 622, 629, 779 P.2d 740 (1989), courts rejected physician monitoring claims.

Like the hospital's duty to intervene in cases of obvious and known negligence, Washington courts have held that under appropriate circumstances hospitals may have a duty to directly supervise non-agent

medical staff. *Douglas v. Freeman*, 117 Wn.2d 242, 814 P.2d 1160 (1991), involved a dental student who performed dental surgery without an instructor or an assistant. The court ruled the dental clinic violated its duty of supervision based on the dental student's own testimony that performing the surgical procedure without assistance breached the standard of care. 117 Wn.2d at 247. In contrast, the Wuths' standard of care expert testified the treating physician here ***met*** the standard of care by going ahead with performance of the CVS procedure. RP 1110:16-21. *Cf. Douglas*, 117 Wn.2d at 260 (Utter, J. dissenting) (dissenters believed plaintiff failed to establish the independent negligence of the hospital through the "selection, supervision or retention of the doctor").

As the trial court itself recognized, a hospital's corporate duties are limited. RP 1936; *see also* WPI 105.02.02 (compiling court-recognized hospital corporate duties). This case does not involve a situation where the hospital corporate negligence doctrine is necessary to fill the independent contractor gap. The Wuths make no suggestion that anyone furnishing medical services should have been removed as unqualified. Similarly, the Wuths do not contend that in the course of Ms. Wuth's outpatient procedure, Valley became aware of "obvious negligence" such that Valley should have intervened in her treatment. Nor did the Wuths posit that special supervision of her treating physician would have

prevented him from falling below the standard of care. To the contrary, the Wuths' experts testified the treating physician ***met*** the standard of care by going ahead with the CVS procedure and making arrangements for transmission of the Children's report using Valley's medical assistant. RP 2614:10-19; RP 2624:4-15; RP 2630:13-2631:5; RP 2642:21-23. In short, none of the grounds for hospital corporate negligence exists here.

2. The trial court improperly allowed the jury to infer Valley's negligence.

Rather than relying on established hospital duties, the Wuths' corporate negligence claim contended Valley was negligent for scheduling Ms. Wuth's appointment on a day when a genetic counselor would not be present ("scheduling"), for not having a genetic counselor present during Ms. Wuth's procedure ("staffing"), and for not ensuring that staff refer Ms. Wuth to a different facility with a genetic counselor on site ("training"). CP 11615. But it is undisputed that completing Ms. Wuth's appointment with her physician instead of arranging for a separate genetic counselor session ***satisfied the standard of care***. RP 2642:21-23 ("none of our experts are willing to say that it's below a standard of care to go forward with the CVS under these circumstances"); *see also* RP 2614:10-19; RP 2624:4-15; RP 2630:13-2631:5. Indeed, the Wuths' experts pinpointed the exact cause of their claimed injury. For example, hospital

administration expert Dr. Kochenour testified with respect to the Children's report: "Somebody fell down. Either the hospital didn't send it or the laboratory lost it, but somehow it got lost. It will be up to the jury to decide." RP 648:10-12. Similarly, the Wuths' cytogenic expert, Dr. Clark, testified that if Valley's employee enclosed the Children's report along with the sample sent to LabCorp, it "would have given the lab sufficient information to do its job." According to Dr. Clark, this is "really the big question in this case." RP 1230:1-14. *See also* RP 3920:25-3921:7) (trial court similarly characterizes "big questions here in this case").

The Court should remand for a new trial because it is impossible to determine from the verdict form, CP 14271-72, how the jury answered the "big question" of whether Valley's agent, Ms. Shelton, actually deviated from the standard of care—which is of course a necessary predicate for health care liability. *See, e.g.*, RCW 7.70.030. If Ms. Shelton failed to follow Dr. Harding's instruction to send the Children's report to LabCorp, Valley would have been vicariously liable for the acts of its employee. But rather than require the Wuths to prove Ms. Shelton indeed failed to send the Children's report, the corporate negligence claim instead provided a concurrent and independent basis to impose liability on

Valley—***even if the jury believed Ms. Shelton in fact sent the Children's report.***

"As a general rule, a defendant's negligence is not presumed, but must be affirmatively proved." *Jackass Mt. Ranch, Inc. v. S. Columbia Basin Irr. Dist*, 175 Wn. App. 374, 397, 305 P.2d 1108 (2013); *see also* RCW 7.70.030 (health care burden of proof). But by allowing the Wuths to assert theories of corporate negligence that allow the jury to infer causation, the trial court effectively shifted the burden of proof from the Wuths to Valley. *Cf. Jackass Mtn. Ranch*, 175 Wn. App. at 398-99 (under res ipsa loquatur, "the burden switches to the defendant to produce exculpatory evidence that rebuts or overcomes the presumption or inference of his or her negligence"). In other words, rather than require the Wuths to prove specific hospital employees and agents actually breached the standard of care in the course of providing particular services to the Wuths, the trial court's rulings allowed the jury to infer the Wuths' injuries could have been avoided by the hypothetical addition of more hospital funding, staffing, training, or policies. But doctrines of inferred causation, which "spare[] the plaintiff the requirement of proving specific acts of negligence," apply only where the plaintiff asserts he or she suffered an injury, the "cause[s] of which cannot be fully explained." *Id.* at 397-98 (citation omitted). "[I]f plaintiff's evidence goes so far as to

fully explain the cause or causes of the accident which injured him, he loses the right to rely on res ipsa" doctrine of inferred causation. *Van Hook v. Anderson*, 64 Wn. App. 353, 360 n.7, 824 P.2d 509 (1992) (quoting *Kemalyan v. Henderson*, 45 Wn.2d 693, 706, 277 P.2d 372 (1954)).

Moreover, allowing the Wuths to pursue a corporate negligence claim was error on the additional ground that the Wuths contended their injury arose from acts of Valley ***or*** LabCorp. As the Wuths' counsel explained in his opening statement: "We're suing LabCorp. And whether LabCorp lost the documents, as Valley alleges, or whether Valley never sent them, as LabCorp alleges, doesn't matter to the plaintiffs, because either way, one of them failed." RP 444:13-16; *see also* RP 2661:13-20 ("One of those two things happened, right?"). But once the plaintiff introduces evidence that the acts or omissions of two or more independent persons could have caused the plaintiff's injury, "the negligence of ***neither*** of such persons can be presumed" because the plaintiff "himself has made it impossible to say" that "but for some negligence by the defendant, the injury would not have occurred." *McKinney v. Frodsham*, 57 Wn.2d 126, 134-35, 356 P.2d 100 (1960) (quotation in part omitted; emphasis added).

For example, in *Howell v. Spokane & Inland Empire Blood Bank*, 114 Wn.2d 42, 785 P.2d 815 (1990), which involved a chain of parties

involved in the transfer of contaminated blood, the Washington Supreme Court held as a matter of law the plaintiff could not rely on a theory of inferred negligence. "The blood was donated by John Doe X, collected by the SIEBB, and transfused by the hospital. In this context, no one defendant can be said to have had exclusive control over the blood so as to infer negligence." 114 Wn.2d at 58. Likewise, the Wuths' claim arose from the transfer of the Children's report from Valley's physician agent and medical assistant employee, to a delivery service, to LabCorp. Because the Wuths alleged negligent conduct by both Valley and LabCorp, it was error to also allow the jury to infer causation through an additional corporate negligence claim. "When it is shown that the accident might have happened as the result of one of two causes, the reason for the rule fails and it cannot be invoked." *McKinney*, 57 Wn.2d at 135 (reversing verdict are erroneous res ipsa instruction) (citation omitted).

3. The trial court's hospital corporate negligence errors substantially prejudiced Valley.

In addition to allowing the jury to impose liability on Valley without regard to whether or not its individual healthcare providers satisfied the standard of care, the trial court's erroneous corporate negligent rulings prejudiced Valley in other important ways:

First, these new corporate duties opened the door for the Wuths to

introduce inflammatory and speculative testimony about Valley's financial administration. Although the Wuths justified the admission of evidence regarding Valley's finances as helping the jury to evaluate the adequacy of the hospital's training programs and staffing decisions, counsel made no effort to disguise the Wuths' suggestion that Valley must have cared more about making a profit than its patients' well-being. As the trial court pointed out, the corporate negligence claim provided the device to suggest to the jury that "Valley is profiting at the expense of adequate staffing." RP 4330:19-22. The testimony elicited from one of the Wuths' "hospital administration" experts, Paul Hofmann, illustrates this misuse of the corporate negligence doctrine: "So clearly they had sufficient resources to provide greater coverage, and inexplicably they decided not to do so." RP 2345:17-19; *see also* RP 2316:2-6 ("particularly where there were sufficient resources . . . conspired, if you will, to irreversibly compromise a patient"). Similarly, the Wuths' counsel told the jury during closing that because a part of their job was to "deter future misconduct" by Valley in establishing staffing levels, their verdict should take into account the fact hospital revenue was "higher than budgeted" and spending on patient care was "[l]ess than what was budgeted." RP 5257:7-5262:3.

Second, the trial court granted the Wuths' expert witnesses latitude to deviate from earlier deposition testimony regarding staffing and

training, *see, e.g.*, RP (10/24/13) 244:14-17, while incorrectly instructing the jury that Valley's CR 30(b)(6) designees were bound by earlier testimony on these same topics. *See, e.g.*, RP 2357:1-9, RP 2692-93, RP 3014:13-18. "[T]he testimony of a Rule 30(b)(6) representative, although admissible against the party that designates the representative, is not a judicial admission absolutely binding on that party." *Erickson v. Microaire Surgical Instruments LLC*, 2010 WL 1881942, at *2 (W.D. Wash. May 6, 2010). Testimony at a Rule 30(b)(6) deposition is evidence which, like any other deposition testimony, "if altered, may be explained and then explored through cross-examination as to why it was altered." *Id.* (citing *Casper v. Esteb Enter., Inc.*, 119 Wn. App. 759, 767, 82 P.3d 1223, 1228 (Wash. 2004)). But the court not only required Valley to refute an inference of negligence, it excluded admissible evidence and incorrectly designated other testimony as binding party admissions.

Third, the corporate negligence jury instruction (CP 11615) misstated Washington law and improperly commented on the evidence. The parties each provided expert testimony regarding the standard of care the jury should apply to hospital staffing. *See* RP 661:10-662:11, RP 2294:18-24 (Wuths staffing standard of care testimony), and RP 4599:7-23 (Valley standard of care testimony). The trial court erred by instructing the jury to disregard the staffing standard of care testimony by Valley's

experts. *Martin v. Kidwiler*, 71 Wn.2d 47, 50-51, 426 P.2d 489 (1967) (trial court correctly refused to give plaintiff's proposed instruction which assumed a fact for the jury's determination); *Harris v. Groth*, 31 Wn. App. 876, 881, 645 P.2d 1104 (1982) (trial court in medical malpractice case properly rejected instruction that emphasized testimony of plaintiff's expert). The Court should reverse the order denying summary judgment on the Wuths' corporate negligence claim, and should remand for a new trial.

B. The Trial Court Allowed the Wuths to Seek Improper Damages for Wrongful Birth and Wrongful Life.

In limited circumstances, parents may recover damages related to the unplanned birth of a child. *Harbeson*, 98 Wn.2d at 476-77. Washington is also one of only three states allowing children to assert "wrongful life" claims seeking recovery of "extraordinary expenses" incurred during their lifetimes. *Id.* at 479-80. Judge McCullough's order denying defendants' motion for summary judgment on the Wuths' *Harbeson* claims, CP 14212-14, is reviewed de novo. *Greenbank Beach and Boat Club, Inc.*, 168 Wn. App. at 522. The measure of damages is a legal question likewise reviewed de novo. *Shoemake ex rel. Guardian v. Ferrer*, 168 Wn.2d 193, 198, 225 P.3d 990 (2010). For those categories of damages potentially available under *Harbeson*, the verdict must be

supported by substantial evidence. *Mutual of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*, 178 Wn. App. 702, 722, 315 P.3d 1143 (2013).

1. The Wuths' claims should have been dismissed as inconsistent with developments in case law and society.

Society's understanding of disabled individuals has evolved in the three decades since *Harbeson* pejoratively referred twenty-one times to the birth of a "defective child." As the Supreme Court has recognized, courts should allow only damages that "may be established with ***reasonable certainty***, and ***do not invite disparagement of the child*** involved." *McKernan v. Aasheim*, 102 Wn.2d 411, 422, 687 P.2d 850 (1984) (emphasis added); *Moorman v. Walker*, 54 Wn. App. 461, 465, 773 P.2d 887 (1989) (courts "will not collaborate in conduct that disparages an innocent child"); *see also* D.M. Sheth, *Better Off Unborn? An Analysis Of Wrongful Birth And Wrongful Life Claims Under The Americans With Disabilities Act*, 73 Tenn. L. Rev. 641, 646-647 (2006). Pursuant to RAP 10.1(g), Valley joins in the arguments for dismissing the Wuths' *Harbeson* claims detailed by LabCorp in its brief.

2. The court erred by awarding $25 million for emotional distress without evidence of objective symptomology.

Even if *Harbeson* applies to the Wuths, this case also presents the issue of the proper measure of damages. Washington negligence law generally disfavors emotional distress damages in the absence of physical

harm. *See, e.g., Bylsma v. Burger King Corp.*, 176 Wn.2d 555, 560, 293 P.3d 1168 (2013). The Court's opinion in *Harbeson* itself did not specifically address the proof requirement for such claims, and neither the Legislature nor the Supreme Court has recognized wrongful birth claims as an exception to the general tort rule. Rhea and Brock Wuths' wrongful birth claim therefore fails as a matter of law under ordinary negligence principles.

First, because "the parties lacked a pre-existing relationship; and the defendants' breach was negligent rather than intentional, emotional distress damages are available only if the plaintiff proves 'objective symptomology'" corroborating the claimed distress. *Price v. State*, 114 Wn. App. 65, 71, 57 P.3d 639 (2002) (citations omitted). To satisfy the objective symptomatology requirement, "a plaintiff's emotional distress must be susceptible to medical diagnosis and proved through medical evidence." *Hegel v. McMahon*, 136 Wn.2d 122, 135, 960 P.2d 424 (1998). Rhea and Brock Wuths did not seek counseling or medical care, RP 1519:21-24, RP 1520:12-14, RP 1831:9-10, and offered not a shred of evidence establishing objective symptomology to support the jury's $25 million verdict.

Second, even for parties with a pre-existing relationship, the objective symptomology requirement is not limited to the specific tort of

negligent infliction of emotional distress, but rather applies to negligence claims generally. The Supreme Court previously declined to reverse this Court's ruling that the objective symptomology requirement is limited to claims of negligent infliction of emotional distress. *Berger v. Sonneland*, 144 Wn.2d 91, 113, 26 P.3d 257 (2001) (defendant "cites no authority" for proposition that rule applies to claims under RCW 7.70). But as the Supreme Court has subsequently held, "In negligence cases" Washington law "allow[s] claims for emotional distress in the absence of physical injury" ***only*** when "manifest by objective symptomology." *Bylsma*, 176 Wn.2d at 560 (products liability claim). This Court should therefore reverse the judgment in favor of Rhea and Brock Wuth, and remand for entry of judgment in favor of defendants on their claim or for a new trial applying the correct damages measure.

3. The court also included improper damages for Oliver's wrongful life claim.

The Court should order a new trial on Oliver's wrongful life claim. Even if Oliver stated a claim under *Harbeson*, the trial court erred by entering a judgment exceeding the amount of future medical expenses proved to a "reasonable certainty." *McKernan*, 102 Wn.2d 411 at 419.

The Wuths used a three-step process to establish Oliver's claim for medically necessary expenses. First, Dr. Glass, a child neurologist, opined

as to Oliver's future medical needs. Second, Dr. Gracey, a "life planner," quantified the cost of meeting each of these needs over Oliver's lifetime. Dr. Gracey presented these calculations as "Option 1," which included 24/7 one-on-one medical attention, and "Option 2," which contemplated establishing a private group home in a residential setting. (Option 2 responded to defendants' experts opinion that Oliver's medical needs could be met in a ***public*** group home residential setting.)[2] The Wuths' economics expert, Dr. Tapia, then calculated the present value of Option 1 at between $17.6 and $23.7 million, and the present value of Option 2 at between $11 and $14 million. RP 2123:23-2125:18, RP 2151:5-2152:6. (Defendants' economics expert calculated the present value of Option 1 at $8.2 million, and Option 2 at $5.8 million. Trial Ex. 361.) But the trial court entered a judgment for $25,000,000—an amount in excess of even Option 1.

Future medical expenses, like all damages, must be established to "reasonable certainty." *McKernan*, 102 Wn.2d at 419. But to avoid awards based on conjecture or speculation, future medical expenses must

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[2] The trial court denied Valley's motion to exclude speculation that public group homes are dangerous. CP 11747. Plaintiffs' contention that placement in private rather than public facilities is medically necessary for Oliver is untenable—otherwise the State would be exposed to liability every time it places a foster child in a group home, or refers a patient for treatment at Harborview rather than Swedish. *Cf. In re Marriage of Shellenberger*, 80 Wn. App. 71, 85, 906 P.2d 968 (1995) (in custody cases courts cannot require "objecting parents of modest means to pay for private college where the child can obtain a degree in his or her chosen field at a publicly subsidized institution").

also be "reasonably certain to be ***necessary*** in the future." *See Stevens v. Gordon*, 118 Wn. App. 43, 55, 74 P.3d 653 (2003) (emphasis added); *Erdmen v. Lower Yakima Valley B.P.O.E. Lodge No. 2112,* 41 Wn. App. 197, 208, 704 P.2d 150 (1985) ("The general rule is that one may recover for future medical expenses reasonably certain to be incurred."); *see also Leak v. U.S. Rubber Co.*, 9 Wn. App. 98, 100–01, 511 P.2d 88 (1973) (requiring medical testimony as necessary to avoid conjecture or speculation); *Salahuddin v. Glebe*, 2014 WL 793146, at *5 (W.D. Wash. Feb. 26, 2014) (medical diagnosis inadmissible because lacks reasonable degree of medical certainty). Without a showing of necessity for a future medical-related expense, the expense cannot be recovered.

This Court should not hesitate to order a new trial when a court has entered judgment for unproven future expenses. *See Martin v. Foss Launch & Tug Co.*, 59 Wn.2d 302, 305–09, 367 P.2d 981 (1962) (reducing excessive verdict for medical and other expenses); *Shipman v. Foisy*, 49 Wn.2d 406, 409, 302 P.2d 480 (1956) (reducing verdict because travel expenses not shown to be reasonably necessary); *Caldbick v. Marysville Water & Power Co.*, 114 Wn. 562, 567–68, 195 P. 1027 (1921) (jury should have been instructed not to return verdict in excess of testimony); *Swanson v. Pacific Shipping Co.*, 60 Wn. 87, 97, 110 P. 795 (1910)

("verdict should not be permitted to stand for any award in excess of compensation.").

In *Carlton v. H.C. Price Co.*, 640 F.2d 573 (5th Cir. 1981), the Fifth Circuit applied Alaska law to reduce a verdict of future medical expenses to those amounts supported by the evidence. Like Washington, Alaska "requires that future medical damages be proved 'to a reasonable certainty that they will occur in the future.'" *Id.* at 578 (quoting *City of Fairbanks v. Nesbett*, 432 P.2d 607, 618 (Alaska 1967) (court remanded for new trial because trial court entered judgment in excess of evidence)). As in *Carlton,* the trial court's judgment in favor of Oliver exceeds the maximum possible verdict that could have been awarded based on medical evidence. The Wuths' "prepare for the worst" approach, RP 3122:24-3123:6, lacked any basis in law.

First, the judgment improperly exceeds $23,675,000, the maximum amount calculated by the Wuths' experts for Oliver's future care. Oliver's life planner relied on physicians and medical professionals to determine what ought to be included in the life plan. RP 2125:24–2126:13. So, for example, the life plan does not include any expenses associated with seizures that Oliver might have in the future—because there was no reliable medical evidence if or when he might have seizures, how intense they might be, or what treatment might be required. RP

2439:1–9. The life plan, reduced to its present value, sets the boundaries for a verdict ***based on medical evidence***. The Wuths' experts concluded that $23,675,000 would provide one-on-one, continual care for Oliver's whole life, even after making the most conservative possible assumptions. Because the jury lacked any evidence to support an award for future medical expenses beyond those described in the Wuth experts' life plan, the $25 million verdict is excessive on its face.

Second, even the amount Oliver requested under Option 1—up to $23,675,000—would be excessive. Oliver's life plan included continual one-on-one care, even though the Wuths' experts could not testify that Oliver would be "reasonably certain" to require a personal attendant at night. "I don't think at night it has to be someone necessarily who is solely devoted to Ollie," and although someone needed to be "individually available," at night "it could be someone who is shared among one or two others." RP 1975:1–18. The experts speculated that Oliver ***might*** need more care if he developed a serious sleep disorder. RP 2042:11–2043:14. But, based on the medical evidence, the Wuths' expert testified Oliver needed individualized support for 15 to 16 hours a day, not 24 hours a day. RP 2044:10–2045:20. As one of the defendants' experts explained, individual, one-on-one, nighttime care is prescribed for people with

problems like spinal cord paralysis who cannot breathe independently. RP 3660:20–3661:19.

Finally, Washington law permits recovery only of medically necessary expenses—not premium private care. In particular, the jury erred by including the costs of a lifetime personal attendant when the Wuths' experts admitted in their Option 2 that a private group home was a reasonable treatment option. The Wuths' experts did not testify that one-on-one, around-the-clock private care was the only available care option. To the contrary, their expert, Dr. Glass, endorsed a group home as a "reasonable option" for Oliver. RP 2036:9–12; CP 6996. That is why the life plan identified Option 2 as a reasonable treatment option. RP 2471:20–23; RP 2150:17–2151:19. Because Oliver's $25 million judgment goes beyond compensating him for any legally cognizable injury, this Court should reverse. At a minimum, the Court should remand for a new trial restricting the Wuths' wrongful birth and Oliver's wrongful life claims to proper damage components.

C. This Court Should Reverse the Jury's Excessive Verdict.

This Court reviews for abuse of discretion the trial court's ruling denying defendants' CR 59 motions for a new trial. *Edwards v. Le Duc*, 157 Wn. App. 455, 459, 238 P.3d 1187 (2010). In limine orders and other

evidentiary rulings are likewise reviewed for abuse of discretion. *Mutual of Enumclaw Ins. Co.*, 178 Wn. App. at 728.

1. The Wuths improperly sought deterrent damages.

The Wuths made no secret of their plan "to ask that the jury, ***through its verdict***, take action that would ***deter*** LabCorp, Valley and other laboratories and maternal fetal medicine centers from failing to . . . properly meet the needs of their patients." CP 5953:21-5954:2 (emphasis added). According to the Wuths, in this "unique case" it would be inappropriate to instruct the jury to "only consider reasonable compensation for the plaintiffs" without reference to "deterrence." CP 5952:5-9. The Wuths contended their reliance on deterrence did not run afoul of Washington's prohibition on punitive damages because it is forward looking. "For example, in order to deter future misconduct by a bully, it may be necessary to fight back. Such action may lead the bully to modify his or her behavior on account of the 'fear of the consequences.'" CP 5954:7-9.

Valley moved to exclude such improper testimony and argument. CP 5022:3-5024:22. The trial court, however, took a different view on what information the jury should properly consider. During voir dire, the trial court rebuked a juror who expressed concern about medical negligence cases. RP (10/23/13) 162:13-164:17. Later the same day,

while ruling on Valley's in limine motions, the court described the juror as a victim of a "propaganda effort" by "industry and corporations" to "say these verdicts are ridiculous." RP 196:20-197:7. The court expressed further concern that because of the recession, "we've had a swing of the pendulum to the point where juries don't understand why we have a tort system anymore." RP 198:4-7. The court agreed to allow the Wuths to discuss not only the evidence, but also the broader policy implications of their claims. "I'm with you Mr. Gardner [counsel for the Wuths], as I told the jury, that we do have a tort system to make sure that there is some consequences . . . . If there isn't an expectation that something will happen . . . [w]e all live in a much more unsafe world." RP 198:8-14.

During trial the Wuths indeed painted the picture that Valley acted with willful indifference to the Wuths' needs, instead practicing "corporate medicine" with treatment decisions based on the return on investment rather than the quality of patient care. RP 2345:17-19, RP 4330:19-22, RP 5308:10-13. At closing, the Wuths' counsel began his argument by explaining to the jury the need to "hold defendants accountable for the harm they cause" both with monetary compensation "to the family" and "deterrence" for "future misconduct." RP 5257:4-21. Plaintiffs' counsel then asked the jury to "think about how the ***award*** that you come up" with "***compensates*** the plaintiffs" ***and*** acts "to ***deter any***

future misconduct." RP 5257:15-5258:2 (emphasis added). Similarly, in his discussion of each element of damages, the Wuths' counsel reminded the jury of the deterrence element. "Now let's talk about damages. Now, again, . . . Washington holds defendants fully accountable; ***compensation as well as deterrence***." RP 5287:10-12 (emphasis added). And in asking the jury to award emotional distress damages to the parents, counsel asked them to "[r]emember the public policies in this case: Compensation and deterrence." RP 5308:5-7. The Wuths' counsel followed the request for a multi-million dollar emotion distress award with a review of the corporate medicine evidence. "Let's look at whether the business of medicine for these two defendants, Valley and LabCorp, has outweighed the practice of medicine, because that's relevant to their negligence." RP 5308:10-13.

Dr. Harding then amplified the Wuths' arguments. In her closing, Dr. Harding's attorney asked the jury to distinguish between her client and the two corporate defendants, and award any damages against Dr. Harding based only on "compensation." She observed that although the Wuths' counsel had told the jury the purpose of damages was "for compensation and deterrence," the "reasons" for deterrence "do not apply to Dr. Harding." RP 5381:1-19. The proceedings then adjourned for a recess before LabCorp and Valley would make their closing arguments.

By that point even the trial court realized its error. "[I]t's misconduct for the court to instruct the jury that the function of damages is deterrence. The function of damages is compensation. The WPI's and the law couldn't be more clear about that." RP 5387:23-5388:2. When the jury returned, the court attempted to offer a curative instruction. RP 5388:18-5389:16. But given the fact that even experienced counsel for the Wuths and Dr. Harding did not appreciate the distinction the trial court was trying to draw,[3] it is unreasonable to think the jury could unring the bell after two full closing arguments (and a multi-week trial) improperly conflated compensation and deterrence damages. The verdict in excess of even the high end of counsel's request confirms the jury acted from an understandable but mistaken belief Washington law permits "deterrence" damages beyond actual compensation. This Court should reverse. *Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 89, 272 P.3d 827 (2012) (deterrence is "one of the essential goals of punitive damages."); *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 51, 25 P. 1072 (1891); *Hickman v. Desimone*, 188 Wash. 499, 501, 62 P.2d 1338 (1936).

2. The jury pool and final jury were skewed by an inflammatory and intrusive voir dire process.

The Wuths improperly received a special ***exemption*** from the

[3] "THE COURT: Mr. Gardner, it's true, though. We don't award damages to deter. We award damages to compensate. RP 5386:13-17. *See also* RP 5387:15-18 (THE COURT: No. We don't have punitive damages in this state for a reason.")

statutory requirement to empanel a jury drawn from a "fair cross section of the population served by the court." RCW 2.36.080(1). Among the many elements of the Wuths' case was establishing that each defendant was a "proximate cause" of the parents' decision to "take the pregnancy to term." CP 11607-09 (Inst. 6). And for the parents' wrongful birth damages, the court specifically instructed the jury to calculate emotional distress damages "after considering the emotional benefits to the parents from [their son's] birth." CP 11619-20 (Inst. 16). But although civil jurors routinely determine proximate cause and damages, the Wuths asked the trial court to exclude for cause ***any*** prospective jurors who had reservations about terminating pregnancies:

> Any juror who comes to court with a long-held ***bias against abortion*** would be ***predisposed to find against the Wuths on liability or to not award any damages*** for Brock and Rhea's parental grief, anguish and emotional distress for giving birth to a genetically defective child. Such jurors would ***not be qualified*** as juror on this case.

CP 4455:20-4456:4. To identify jurors with a "bias against abortion," the Wuths asked the court to adopt the "'death qualification' procedure" used in death penalty cases in which jurors would complete a "questionnaire" followed by "individual questioning" of each "prospective juror whose answers to the abortion-related questions raises concerns." CP 4457-59.

Applying the capital-murder qualification standard to jurors in a civil case presents extraordinary concerns because the "juror's bias need not be 'unmistakably clear' before dismissal is allowed." *State v. Gregory*, 158 Wn.2d 759, 813, 147 P.3d 1201 (2006) (internal quotation omitted); *see also* CP 5943 (empanelling "pro-lifer[s]" who "profess an ability to follow the law" would deprive the plaintiffs "from having a fair trial").

When the court empaneled the jury, it issued a short questionnaire that asked each juror if they believed in "most circumstances" abortion was "morally wrong or should be illegal." CP 8710. Jurors who responded affirmatively—but not those that responded "no"—were brought in for extended individual questioning to qualify them on the subject of abortion. CP 11963-71; RP (10/21/13) 2:8-16. The judge and counsel examined this subset of prospective jurors—who had no independent information about the case or the issues they would be asked to decide—using confusing and misleading "shorthand." RP (10/21/13) 3:19-10:1. The actual ***causation*** issue the jurors would be asked to decide was whether defendants' alleged negligence affected the parents' decision to "take the pregnancy to term." But in her questions to prospective jurors who had already expressed reservations on the subject of abortion, the judge made it appear jurors were being asked to decide the constitutionality of abortion. The court re-characterized this element of

causation as arising from an "injury from not being able to exercise their right to terminate the pregnancy." RP (10/22/13 pm) 14:17-19; RP (10/21/13) 179:11-14 ("for not being able to exercise the option to terminate the pregnancy."); RP (10/21/13) 215:21-23 ("they lost their ability to terminate the pregnancy").

The trial court similarly characterized the legal basis of the Wuths' ***damage*** claim for wrongful birth. The actual issue to be decided was the net "emotional distress" suffered by the parents, after considering their "emotional benefits from his birth"—which the trial court instead mischaracterized as damages because "they weren't able to exercise their legal right to terminate [the pregnancy]." RP (10/21/13) 182:11-15, RP (10/21/13) 224:3-6 ("And they're going to be asking for a lot of compensation for them . . . for not having the right to have an abortion"); RP (10/22/13 pm) 17:21-18:2 ("They have a right to that remedy. . . . [T]hey're entitled to recover for not being able to use the remedy they wanted to use which was lawful.").

In addition to using this misleading language in the descriptions of causation and damages to jurors who had expressed reservations about the subject of abortion—a process the trial court described as "shortcutting" (RP (10/22/13 am) 74:22-75:4)—the court further confused matters by lapsing into role play, RP (10/21/13) 205:17-20 ("Well in this case my

clients would be asking . . . ."), and interrupting jurors with inflammatory prompts, RP (10/22/13 am) 87:17 ("That abortion is murder.").

Washington statute mandates a jury drawn from a "fair cross section of the population." RCW 2.36.080(1). Instead, the trial court qualified prospective jurors based on a "bias against abortion." Qualifying a jury based on shared attitudes perceived to impair a group member's ability to perform his or her duty changes the panel's composition because it is no longer a fair cross-section of the population. Moreover, the use of "shorthand," instead of precise and accurate descriptions of causation and damages, created the false impression that rather than deciding a malpractice claim involving a genetic test, the jurors—like a panel imposing the death penalty—would be asked to determine the Wuths' "legal right to terminate" the pregnancy. This Court should order a new trial. *Edwards*, 157 Wn. App. at 464.

3. The trial court erred by allowing cumulative and prejudicial references to other Wuth family members.

Brock Wuth's older cousin Jackie Mills was born with a disability that in hindsight has been recognized to involve an unbalanced translocation. RP (01/11/13) 6:14-24; RP 2207:8-18. Unlike Oliver, Jackie did not receive early intervention, and has profound disabilities including terrible seizures, anti-social behavior, and obesity that confines

her to a wheelchair. *Id.*, *see also* RP 1730:15-1733:2, RP 2209:24-2215.9. The Wuth's child neurologist, Dr. Glass, testified in his deposition and at trial it would be "cheesy and inaccurate" to predict Oliver's prognosis or future medical needs based on Jackie's condition. RP 1922. Brock also had a disabled aunt, Patsy Mills, who died young without meeting him (RP (10/24/13) 275:13-21); *see also* RP (10/24/13) 278:4-13 (judge rules "the jury can't draw any medical conclusions...about Patsy, given the absence of testing")

Valley vigorously objected to the admission of evidence regarding Jackie and Patsy, and in particular evidence that would imply a legitimate comparison between Jackie and Oliver. RP (10/24/13) 274:21-275:1 ("very prejudicial"). The court acknowledged the limited relevance of the proffered evidence. *See*, *e.g.*, RP 1489:13-1490:9, RP 1922-23, RP 1933-34. But the court refused to exclude ***any*** evidence related to Jackie or Patsy. Instead, the court repeatedly instructed the jury that the evidence could be considered for two purposes: (i) as a basis to "assess the opinion" of the Wuths' experts, and (ii) to corroborate the uncontested testimony of the Wuths (and all of their friends and relatives) that they would have terminated the pregnancy if there was a 2;9 unbalanced translocation. RP (10/23/13) 104:22-105:22, RP 1488:20-1490:9, RP 2220:7-11, RP 2222:2-8. The court's untenable rulings require a new trial.

First, the court misapplied ER 705. Despite the fact the Wuths' experts disavowed relying on Jackie in formulating their opinions, the trial court admitted evidence of Jackie to allow the jury to "assess the opinion" of the Wuths' experts. But ER 705 merely "permits an expert witness to take into account matters which are unadmitted and inadmissible"; it does not "enable a witness to summarize and reiterate all manner of inadmissible evidence." *State v. Martinez*, 78 Wn. App. 870, 879-80, 723 P.2d 464 (1995). Moreover, ER 705 was designed to allow ***opposing parties*** or the court to scrutinize the underlying facts supporting an expert's opinion. *State v. Anderson*, 44 Wn. App. 644, 652, 723 P.2d 464 (1986). It was never intended to enable the expert's proponent to admit inadmissible evidence as an explanation of an expert's opinion. *Teter v. Deck*, 174 Wn.2d 207, 224, 274 P.3d 336 (2012).

Second, because defendants had not stipulated to proximate cause, the court refused to take any steps to limit the massive prejudice from comparisons with Jackie. RP (10/24/13) 281:6-25. Thus, despite the acknowledged unfairness of the comparison, the Wuths were given a free hand to show side-by-side photographs of the two. RP 2779:15-2781:15; Trial Ex. 7.6. The court also permitted the Wuths to show the jury a graphic video of Jackie taken "a couple years after Ollie's born"—purportedly to establish the Wuths' state of mind ***prior*** to Oliver's birth.

RP (10/24/13) 279:21-280:4. As the court eventually observed, "we have spent an incredible amount of time on Jackie," RP 2261:13-19, despite the prejudice associated with doing so.

Finally, the ineffectiveness of the court's limiting instruction is apparent from counsel's argument that the jury consider evidence regarding Jackie not for the two limited purposes identified by the court, but rather as the primary basis for awarding a substantial amount in ***damages*** for Rhea and Brock Wuth's claimed emotional distress. RP 5302:13-5305:5; RP 5304:15-16 (Oliver's behavior "[s]cares her to death, because it's what she sees in Jackie"); RP 5304:19 ("We all watched Jackie's video"). In light of the substantial prejudice to Valley from the ubiquitous comparisons to Jackie, this Court should order a new trial on this additional independent ground.

D. Judge McCullough Erred by Summarily Determining Swedish Employee Elizabeth Starkey was Valley's Apparent Agent.

In November 2007, Valley entered into a short-term service agreement with Swedish Health Services, which agreed to "provide to Valley a genetic counselor" to cover while Valley's regular genetic counselor was on maternity leave. CP 977; RP 4681:6-21. Valley paid Swedish for these services, while Swedish continued to pay its employees' salaries and furnished its genetic counselors as "independent

contractors." CP 977, CP 979. The parties specifically agreed that "[n]othing in this Agreement shall be construed" to create any relationship "other than independent parties contracting with each other solely for the purpose of carrying out the provisions of this Agreement." *Id.*

On January 8, 2008, the Swedish genetic counselor on duty, Elizabeth Starkey, called Ms. Wuth and advised her the LabCorp test showed Oliver was chromosomally normal. RP 4719:18-20, RP 4721:24-4722:6. Ms. Starkey then sent confirmation in writing to Ms. Wuth and her physician. CP 975. (Although her letter was accurately addressed, Ms. Wuth contends she did not receive a copy. RP 67:17-18, RP 1742:25-1743:2, RP 4733:21-24.) The Wuths allege Ms. Starkey was negligent for failing to investigate the test results further before reporting them to Ms. Wuth. RP 1015:18-22. But rather than assert this claim against Swedish, the Wuths alleged Ms. Starkey acted as Valley's apparent agent under the doctrine of respondeat superior. CP 616 ¶ 1, CP 1111:20-22.

Whether a party is an "apparent" agent generally presents "a question of fact to be decided by a jury." *O'Brien v. Hafer*, 122 Wn. App. 279, 281, 93 P.3d 930 (2004). Nevertheless, disregarding longstanding Washington law, the trial court granted partial summary judgment and held Ms. Starkey was Valley's apparent agent as a matter of law. CP 1111. The Wuths' motion relied heavily on their own stated beliefs

regarding Ms. Starkey's status. CP 615-39. But apparent agency can be inferred only from the objective manifestations of the alleged ***principal*** to a third person. *Ranger Ins. Co. v. Pierce Cnty.*, 164 Wn.2d 545, 555, 192 P.3d 886 (2008) (affirming reversal of summary judgment). When, as here, a party fails to proffer evidence of communications between the principal and the third-party related to the services of the purported agent, Washington law requires the third-party to show the ***agreement*** between the principal and agent ***authorized the agent*** to make statements that would reasonably cause the third-party to believe the agent was acting on behalf of the principal. *Hartman v. United Bank Card, Inc.*, 2012 WL 4758052 (W.D. Wash. Oct. 4, 2012). In *Hartman*, for example, the court held the issue of apparent agency was a "***question for the jury***" because the parties' agreement ***required*** the purported agent "to identify itself as [the principal] in all of its marketing activities on behalf of [the principal]." *Id.* at *7.

The Wuths did not even argue the parties' Service Agreement authorized Swedish to make statements that would cause the Wuths to reasonably believe Ms. Starkey was acting on behalf of Valley. Moreover, "there must be evidence to show that the principal had knowledge of the actions taken by its agent for the apparent agency theory to apply." *Boy 1 v. Boy Scouts of America*, 903 F. Supp. 2d 1367, 1373 (2014). Here, there

was no evidence Valley's Service Agreement directed Swedish to hold itself out as Valley, or that Valley knew of any such activity. The court also accepted as fact Ms. Wuth's contention that she did not receive a copy of Ms. Starkey's letter. Because the judge improperly entered summary judgment on a quintessentially factual dispute, this Court should order a new trial on this separate and independent ground.

E. The Trial Court Erroneously Excluded Evidence of Dr. Harding's Secret Settlement with the Wuths.

Pursuant to RAP 10.1(g), Valley joins in the arguments detailed in LabCorp's brief requesting a new trial on this independent ground.

VI. CONCLUSION

The trial court erroneously expanded Washington's hospital corporate negligence and *Harbeson* doctrines and allowed sympathy to interfere with a fair trial, resulting in an excessive $50 million verdict rather than lawful compensation. This Court should reverse and remand for entry of judgment in favor of Valley, or in the alternative remand for a new trial.

DATED this 19th day of September, 2014.

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CERTIFICATE OF SERVICE

The undersigned declares under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On this date I caused to be served in the manner noted below a copy of foregoing on the following:

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Dated this 19th day of September, 2014.

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