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

IN THE 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.

REPLY BRIEF OF APPELLANT VALLEY MEDICAL CENTER

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I. INTRODUCTION

The $50 million judgment against Valley defies fundamental medical malpractice principles. The Wuths contend there is "overwhelming evidence of institutional negligence." Resp. 54. But instead of requiring proof that a deviation from the medical standard of care proximately caused plaintiffs' injuries, the trial court allowed plaintiffs to establish corporate liability with hypothetical scenarios and inflammatory testimony about Valley's revenue and bonuses. The court also permitted the Wuths to use this prejudicial financial evidence to argue for punitive "deterrence" damages to protect future patients, rather than to compensate the Wuths for their claimed injuries. These legal errors, which this Court reviews de novo, require a new trial.

The trial court's error in allowing non-compensatory deterrence damages underscores the lack of substantial admissible evidence supporting the verdict. The wrongful life award to Oliver rests on speculative future expenses plaintiffs' medical experts could not establish with reasonable certainty. And the wrongful birth claim for the parents' non-symptomatic emotional distress improperly relied on a heart-rending videotape showing the condition of a nonparty, which the Wuths' medical expert admitted lacked "any prognostic value." The trial court abused its discretion by admitting this and other prejudicial evidence regarding

family members whose condition and prognosis differ from Oliver's.

Finally, other legal errors subject to de novo review also warrant remand. Among other things, the trial court summarily determined the existence of an agency relationship despite disputed issues of material fact; used a voir dire process that improperly skewed the jury pool; and erroneously instructed the jury that corporate deposition testimony under CR 30(b)(6) constitutes a binding judicial admission. This Court should reverse and remand for a new trial for defendants.

II. ARGUMENT

A. Rather Than Require the Wuths to Prove Each Element of Medical Negligence, the Court Improperly Allowed Them to Argue Financial Considerations Compromised Treatment.

1. The Trial Court Erroneously Allowed Punitive Deterrence Damages.

The Wuths tacitly concede it would be improper to award deterrence-based damages, but baldly assert they never "argued for deterrence damages." Resp. 51. The Wuths ignore what their counsel actually said during closing. Rather than urge the jury to award fair compensation, counsel ***began*** closing by arguing it was the jury's responsibility not only to compensate the family for any harm caused by negligence, but also to deter ***future*** misconduct by Valley and LabCorp to protect other patients. RP 5257:7-21. He told the jury to "think about how the award that you come up with" "[c]ompensates the plaintiffs and

also" acts "to deter any future misconduct." RP 5257:22-5258:2. Later in closing, he returned to the theme, saying "Washington holds defendants fully accountable; compensation as well as deterrence." RP 5287:10-12. He also argued deterrence-based damages above and beyond full compensation were appropriate because "the business of medicine for these two defendants, Valley and LabCorp, has outweighed the practice of medicine." RP 5308:10-13. Dr. Harding's counsel, whose closing followed, sought to limit the Wuths' harmful statements to the two corporate defendants, saying "the reasons for deterrence [damages] ... do not apply to Dr. Harding." RP 5381:11-16. The Wuths explicitly sought damages to deter future wrongdoing by the corporate defendants.

The Wuths' other appeal arguments cannot cleanse the jury's verdict. ***First***, the Wuths never explain how their lawyer's discussion of so-called "corporate medicine" and his request for the jury to award enough money "***to deter*** future misconduct" would be relevant to determine their permissible compensatory damages. RP 5308:10-13.

Second, the Wuths say it "is not improper argument in a bad faith case" to ask the jurors to protect the public interest by awarding deterrence damages. Resp. 52 (citing *Miller v. Kenny*, 180 Wn. App. 772, 817, 325 P.3d 278 (2014)). But this is not a "bad faith case." In contrast, the insurance bad faith claim in *Miller* involved a statute, RCW 19.86.090,

which allows treble damages. 180 Wn. App. at 789.

Third, the Wuths contend the defendants "approv[ed]" the trial court's curative instruction, which supposedly corrected the improper request for punitive deterrence damages. Resp. 51. Not so. The defendants moved to exclude this improper testimony and argument before trial (CP 5022-3-5024:22), asked for a standing objection before closing (RP 5254:16-19), and objected to the inadequate curative instruction, saying "I don't think it's sufficient. I actually don't believe that deterrence should be mentioned at all. It has no place, other than to inflame passions." RP 5384:3-8.

The trial court erroneously permitted the Wuths to ask the jury to factor deterrence in its award to "make sure" Washington's tort system imposed "consequences." RP 198:8-14. But when a party has "no right to punitive damages" it is improper to argue for damages based on financial considerations, such as the practice of so-called corporate medicine. *Phillips v. Thomas*, 70 Wash. 533, 535-36 (1912) (remanding for new trial because involves "inconceivable" error of "such serious character that an instruction will not cure it"). Indeed, even in cases where the law allows punitive damages, courts properly bifurcate trial and exclude evidence of the defendant's financial status until the punitive damages phase—because of the prejudicial effect of allowing that evidence during the liability

phase. *Conti v. Corp. Servs. Grp., Inc.*, 2013 WL 6095564, at *15 (W.D. Wash. Nov. 20, 2013). Because the judgment violates fundamental Washington policy regarding damages, this Court should order a new trial.

2. The Wuths' Hospital Corporate Negligence Claim Fails As a Matter of Law.

The Wuths brush aside the court's error in allowing them to assert a hospital corporate negligence claim without establishing proximate cause, labeling Valley's objections as "meritless." Resp. 58. But unlike their vicarious claims for medical negligence,[1] which involved proof that a member of the medical staff breached the standard of care, the Wuths also pursued a corporate negligence claim that required them simply to conjure a scenario—such as the hospital never having scheduled their appointment—under which their injury would have been avoided. The Wuths' response concedes their attenuated and hypothetical corporate negligence theories sought to impose liability against Valley for ***scheduling*** a CVS procedure, Resp. 62, even though ***performing*** the CVS procedure itself complied with the medical standard of care, and for failing to spend enough money to avert the Wuths' injury, Resp. 61. But as Valley's explained before trial, a plaintiff seeking liability for hospital

[1] Healthcare entities may be ***vicariously*** liable for the conduct of their agents or—as with claims against employers for negligent hiring or supervision—***directly*** liable for harms caused by the breach of specific duties imposed on the hospital itself by the corporate negligence doctrine. *Pedroza v. Bryant*, 101 Wn.2d 226, 230-31, 677 P.2d 166 (1984).

corporate negligence must establish proximate cause rather than simply contend "the genetic counselor would have hypothetically done a better job." CP 5188 (citing RCW 7.70.040). *See Alexander v. Gonser*, 42 Wn. App. 234, 241-42, 711 P.2d 347 (1985) (rejecting hypothetical corporate negligence claim).

a. Valley preserved its objection to the Wuths' corporate negligence claims.

Contrary to the Wuths' suggestion, Resp. 54, Valley objected to their reliance on the corporate negligence doctrine before, during and after trial.[2] Acknowledging Valley's continual pleadings and objections to the corporate negligence doctrine, the court asked Valley to provide "language that is as acceptable to you as possible" for the jury, with the understanding the court would "continue to note your objection." RP 1122; *see id.* 3911 ("the record's clear the court has bullied Valley into giving proposed language . . . without actually giving up your objection").

Relying on the trial's court's assurance that it could participate in the discussion of how to instruct the jury on corporate negligence without waiving its ironclad opposition to the theory, Valley sought to revise the

[2] *See* CP 1474-84 (complaint amendment); CP 3489-3512 (summary judgment); CP 5146-81, 5190-95 (limine #1, 2, 3, 4, 7b, & 7c corporate negligence experts) CP 5185-88 (limine #6 hypothetical theories); CP 5261-64 (limine #26 bonus evidence) CP 5264-67 (limine #27 "keep costs down" theory); CP 9286-97 (memorandum on corporate negligence jury instruction); CP 9774-85 (supplemental memorandum of authorities re corporate negligence doctrine); CP 11928-57 (motion for new trial).

claim instruction. Valley also requested a question on the special verdict form distinguishing between corporate negligence and vicarious negligence: "I think a ***significant change we proposed*** . . . [was] on the ***special verdict form*** . . . . [I]t will be useful to have a line for ***Valley Medical Center vicariously and Valley Medical Center as a corporate entity***. I think that's the ***only way the jury is going to be able to sort that out.***" RP 2759-60 (emphasis added).[3] But the Wuths successfully quashed Valley's proposal for this special verdict language. *Id.*

Without the requested special verdict question, a new trial is necessary because this Court cannot determine whether the jury found a breach of the medical standard of care under RCW 7.70, or merely believed in hindsight that reallocating Valley's resources could have avoided the Wuths' injury. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 539-40, 70 P.3d 126 (2003) (footnote omitted) (remand must be granted if the defendant proposed clarifying special verdict).

b. The Wuths' "scheduling" theory improperly imposed liability for medical treatment that itself complied with the standard of care.

The Wuths' original complaint, which asserted claims against Valley under ***vicarious*** liability principles, provided a basis for complete

[3] *See also id.* 2760 (request for special verdict form to segregate whether Valley was "negligent in a corporate sense, or were they only [vicariously] negligent in a medical negligence sense"); CP 14167 (RP (1-17-14) 14:13-16 ("Valley's liability be broken out on the verdict form, Valley as an entity, Valley as vicariously responsible").

relief. Consistent with RCW 7.70, the claim addressed the treatment received by Ms. Wuth, including the services of (1) her treating physician Dr. Harding (an Obstetrix employee), who provided genetic counseling and performed the procedure to obtain a fetal sample for genetic testing; (2) medical assistant Cathy Shelton (a Valley employee), who assisted Dr. Harding and acting at his direction packaged the fetal sample for genetic testing by the lab; and (3) genetic counselor Elizabeth Starkey (a Swedish employee), who contacted Ms. Wuth to relay the lab report. The Wuths concede each of these theories of medical negligence theories were presented to the jury. Resp. 8.

Nonetheless, the Wuths amended their complaint to add a ***corporate negligence*** claim against Valley involving these same events. CP 1114-27. When the Wuths moved to amend their complaint, they represented to the trial court the corporate negligence claim was being added as a fallback out of concern—ultimately unfounded—they had missed the statutory deadline to assert their vicarious liability claims. According to the Wuths, the new claim would require no additional experts or discovery. CP 1115:9-10; CP 1126:15-16. But once the court allowed the Wuths to amend, they added two so-called "hospital administration" experts, CP 2680-2721, and repeatedly sought to expand the doctrine, including a request for an open-ended jury instruction that if

adopted would have been tantamount to strict liability for any hospital. RP 1936; RP (1/17/14) 9:18-19.

The court's version of the corporate negligence doctrine became so broad it subjected Valley to liability for services the hospital provided to Ms. Wuth regardless of whether Valley's treatment satisfied the standard of care. The Wuths do not dispute Valley ***met*** the standard of care with respect to ***vicarious*** negligence when Dr. Harding completed Ms. Wuth's scheduled appointment to perform a CVS by providing the genetic counseling himself, instead of arranging for a separate genetic counseling session. As the Wuths told the trial court, "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." RP 2642:21-2643:4; *see also* RP 2614:10-19, RP 2624:4-15; RP 2630:13-2631:5.

Unable to contest that ***medically*** the standard of care allowed a physician to perform CVS without a separate genetic counselor, the Wuths resorted to the doctrine of corporate negligence as a basis to impose liability for the ***same healthcare service***—by arguing it fell "below the standard of care for a hospital to ***schedule CVS*** without genetic counseling." Resp. 62 (citing RP 921, 924, 1081-82) (emphasis added). The Wuths alleged many variations of this "scheduling" claim, including that Valley scheduled Ms. Wuth's appointment in "direct violation of its

policy" and that this allegedly improper scheduling occurred because Valley "failed to ***train***" its staff. *Id.* (emphasis added).

Because the imposition of direct liability on Valley was improperly predicated on the scheduling of a CVS procedure that met the standard of care described by the Wuths' own medical experts, their hospital corporate negligence claim fails as a matter of law. *Alexander*, 42 Wn. App. at 241-42. In *Alexander*, the plaintiff alleged defendants' medical treatment caused her fetus to suffer permanent brain damage. The court affirmed dismissal of the hospital corporate negligence claim for failure to demonstrate proximate cause. Although plaintiff's medical expert identified "unacceptable practice patterns" and evidence that the hospital "may not have completely satisfied JCAH standards," the court found it legally insufficient to permit a claim based on "conjecture or mere possibility" that compliance with these standards "might have prevented the hospital and the physician from providing substandard care." *Alexander*, 42 Wn. App. 241-42. *See also Pedroza*, 101 Wn.2d at 228-29; RCW 7.70.040(2) (healthcare claimant must establish proximate cause). Corporate negligence claims fail as a matter of law where, as here, they merely conjecture that stricter compliance with JCAH standards might have prevented the alleged injury. This Court should therefore reverse.

c. The "staffing" theory allowed an inference of negligence based on Valley's financial status.

The Wuths' "staffing" claim presents an even more attenuated version of the Wuth's corporate negligence theory. *See* Resp. 58, 60. The Wuths' medical expert testified that no standards specify the staffing levels for genetic counselors or require a genetic counselor to be present every day. RP 702:9- 703:3. When Ms. Wuth arrived at the clinic, she brought a copy of the genetics report and specified her preference for a CVS over amniocentesis. RP 611:2-3; 18-20. Dr. Harding, an experienced maternal and fetal medicine perinatologist, conducted genetic counseling, RP 1898:8-23; RP 1900:1-12, and the Wuths' experts concede it met the standard of care for him to perform the genetic counselor role. RP 2607:16-19; RP 2630:13-19.

Rather than prove Valley's breach of a medical standard of care caused compensable injuries, the Wuths instead claimed injury because Valley's staffing supposedly involved the "business of medicine." RP 5308:10-13. The Wuths' hospital administration experts testified financial considerations caused their claimed injuries: "[T]hey had sufficient resources to provide greater coverage [for genetic counseling], and inexplicably they decided not to do so." RP 2345:17-19; *see also* RP 2316:2-6 ("particularly when there were sufficient resources . . .

conspired, if you will, to irreversibly compromise a patient"); RP 5308:20-23 ("Having a performance bonus for the VP . . . is wrong because it encourages people to spend less on patient care"); RP 665:13- 666:23. As the trial court observed, the Wuths used their corporate negligence claim to tell the jury "Valley is profiting at the expense of adequate staffing." RP 4330:19-22.

The Wuths now contend their corporate negligence claim did not depend on an inference of negligence based on financial considerations:

> The Wuths proved Valley's negligence through overwhelming evidence, ***not 'inferences***.' Despite a ***doubling of its revenue*** in 2007, Valley cut its genetic counselor coverage . . . .

Resp. 61 (emphasis added). But as the non sequitur in Wuths' own argument demonstrates, their version of the hospital corporate negligence doctrine involves a chain of speculative inferences based on revenue.

The governing statute here, RCW 7.70, requires each claimant to establish proximate cause. *See* Resp. 46 ("The Wuths sued under RCW ch. 7.70 for 'injury arising from health care'"). For both the vicarious and direct claims, "the plaintiff shall have the burden of proving each fact essential to an award by a preponderance of the evidence." RCW 7.70.030. This statutory burden of proof requires plaintiff's medical expert to identify the cause of injury with specificity. For example, a recent decision

dismissed a malpractice claim for lack of causation because the plaintiff's expert could testify only that the ***failure*** to administer blood pressure medicine after surgery was a "substantial factor" in the patient's death. *Rash v. Providence Health & Servs.*, 183 Wn. App. 612, 628-29, 334 P.3d 1154 (2014). Here, however, under the trial court's improper application of the corporate negligence doctrine, the Wuth simply contended a hypothetical reallocation of Valley's financial resources may have avoided the Wuths' injury—even though Dr. Harding actually complied with the standard of care as Ms. Wuth's genetic counselor. RP 2607:16-19.

The Wuths failed to establish proximate cause under RCW 7.70.[4] The trial court's version of the corporate negligence doctrine allowed the jury to impose liability without answering the "really [] big question in this case": whether a breach of the standard of care by Valley's clinic staff caused the Wuths' injuries. RP 1230:1-14 (plaintiffs' expert); RP 3920:15- 3921:7 (trial court). The Wuths assert the jury answered the "big question" merely by "imposing liability on Valley." Resp. 16-17. But the corporate negligence claims taint the verdict. For all this Court knows, the jury imposed liability based on Valley's scheduling of a CVS procedure that indisputably complied with the medical standard of care, or because it

[4] If the judgment is affirmed, future medical malpractice plaintiffs will likely attempt to dispense with vicarious liability claims and medical experts altogether, and instead rely solely on the corporate negligence doctrine to assert purely hypothetical claims based on the hindsight testimony of so-called "hospital administration" experts.

had "sufficient resources" to prevent the alleged injury and "inexplicably" decided "not to do so," RP 2345:17-19—instead of imposing liability for an actual instance of injuries caused by substandard medical treatment, as RCW 7.70 requires. *Alexander*, 42 Wn. App. at 241 ("conjecture or mere possibility" insufficient to establish proximate cause); *Rash*, 183 Wn. App. at 628-29 (omission that was merely a "substantial factor" in the patient's death insufficient to establish proximate cause).

B. Substantial Evidence Does Not Support the Damage Awards.

1. The Jury Awarded Damages for Speculative Future Expenses that Were Not Medically Necessary.

Unable to show that each of Oliver's claimed expenses is medically necessary, the Wuths ask the Court to require them only to "establish[] the ***fact*** of loss with certainty," even though they cannot prove the amount, relying on general tort damages principles. Resp. 42 (emphasis added; citations omitted). But that is not the standard for healthcare claims, including wrongful life claims. *Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 482, 656 P.2d 483 (1983) (a wrongful life plaintiff's "expenses are calculable" and must be proven by medical experts with "reasonable certainty"); Br. 32-33 (collecting cases).

To establish the amount of his future medical expenses, Oliver relied on a multi-step process. Dr. Glass, a medical neurologist, opined as

to his actual medical needs. RP 1973:16-22. Next, Oliver's life care planner, Dr. Gracey, quantified the cost of meeting each of Oliver's actual medical needs over his 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. RP 2451:6-21. The Wuths' economist, Dr. Tapia then "discounted" these amounts to present value, using erroneous assumptions that actually increased Oliver's damages by millions of dollars. *See* Br. 32.

The trial court entered judgment for an amount that ***exceeds*** Option 1. Even the most generous reading of plaintiffs' own expert testimony shows plaintiffs failed to establish these damages with medical certainty. For example, Option 1 ($17.6 to $23.7 million) rested on speculation that Oliver may need 24/7 care in the future if he were to develop a serious sleep disorder. But Dr. Gracey presented Option 2 ($11 to $14 million), which provides care only during the day, because Dr. Glass testified it would be medically appropriate. RP 2043:20-25 (Q: "he [Oliver] [i]s not going to need a one-to-one caregiver to be with him while he sleeps." Dr. Glass: "Right."). Indeed, Dr. Glass testified that if Oliver attended an adult day program he would not need "individualized caregiver for the better part of the day." RP 2044:10-21. Nevertheless, the judgment for

Oliver's care exceeds even the high-end of the range for 24/7 care under Option 1.

The trial court's string of errors resulted in an excessive damage award. Including unnecessary round-the-clock care effectively doubled Oliver's original claim for his reasonably expected medical expenses. *Id.* Dr. Tapia's exaggerated economic assumptions then doubled that amount. *See* Br. 32. Oliver's redoubled claim—further baselessly inflated to $25 million—ballooned to a $50 million total after the Wuths successfully asked the jury to award an equal amount to his parents for their own non-symptomatic emotional distress. RP 5308:3-5. Because Oliver failed to prove his claim, this Court should remand for a new trial.

2. The Wrongful Birth Damage Award Is Based On Inadmissible Evidence Regarding Other Family Members.

The Wuths argue for a "one-to-one ratio of general and special damages." Resp. 47 n.13. However, under RCW 7.70.050(1)(d), the parents' claim must be based on their own compensable injuries, not Oliver's. *Branom v. State*, 94 Wn. App. 964, 973 n.27, 974 P.2d 335 (1999). Emotional distress damages for a wrongful life claim compensate the "parents' emotional injury caused by the birth of the defective child," taking into account the "countervailing emotional benefits attributable to the birth of the child." *Harbeson*, 98 Wn.2d at 475.

Lacking special damages of their own, the Wuths asked the jury to consider the condition of a relative, Jackie, born twenty years before Oliver as the basis for awarding $25 million as compensation for non-symptomatic emotional distress: "[T]he Wuths' knowledge of Jackie's condition exacerbated their emotional distress." Resp. 50 (citing testimony describing concerns about Jackie's behavior and physical issues); *id.* 49 ("Evidence concerning Brock's cousin's condition was relevant to . . . damages").

During closing, the Wuths' counsel argued the jury should calculate the parents' emotional distress damages based on a day-in-the life video of Jackie: "We all watched Jackie's video. . . . . There was a palpable sense of discomfort. . . . And that is part of the sketch of what the future holds for Brock and Rhea." RP 5304-05. But the Wuths' own lead expert on Oliver's cognitive development and status, Dr. Glass, testified the jury should not use the day-in-the-life video for this purpose: "I think my comments still supersede anything that I would glean from the video, and that is that ***Jackie, as a population of one, related or not, does not add any prognostic value to Oliver's circumstances, nor will the video add any more***." RP 2574:4-10 (emphasis added). He further testified it would be "***cheesy and inaccurate***" to use Jackie's condition to predict Oliver's future skills and function. RP 1922 (emphasis added).

The defendants' pediatric neurologist, Dr. Lubens, filed a declaration to the same effect: "I agree with Dr. Glass that Jackie cannot be used to predict Oliver's development and prognosis." CP 5136.

The Wuths exacerbated the prejudice to defendants by arguing the jury should calculate these damages based on Jackie's mother's prayer that her daughter predecease her: "Finally, Lisa Mills' prayer. Remember that? ***Every night she prays that God takes Jackie before her.*** . . . So [when calculating emotional distress damages], ***just remember Lisa Mills' prayer.***" RP 5307:11-20 (emphasis added).

The trial court erred as a matter of law by allowing the Wuths to predicate their emotional distress claim on evidence that was not probative of Oliver's prognosis. Remand is necessary when, after taking into account admissibility, there is a lack of substantial evidence to support a judgment. *See, e.g., In re X.T.,* 174 Wn. App. 733, 739, 300 P.3d 824 (2013) (remanding because "[i]n the absence of the testimony based on inadmissible hearsay, substantial evidence did not support" the judgment); *Seymour v. Dep't of Health*, 152 Wn. App. 156, 172, 216 P.3d 1039 (2009) (same); *see also State v. Justesen*, 121 Wn. App. 83, 94-96, 86 P.3d 1259 (2004) (counsel improperly argued for jury to use polygraph evidence for excluded purpose). The Wuths acknowledge that—despite the undisputed medical evidence—testimony about Jackie's medical

condition increased the Wuths' damage award. *See, e.g.* Resp. 50. Because that was improper, this Court should reverse the judgment and remand for a new trial.

In addition to the legal error of using Jackie to establish the parents' emotional distress damages, the trial court abused its discretion by admitting a mountain of prejudicial testimony and images comparing Oliver to Jackie, and allowing her condition to became a central feature of the trial. In the judge's own words, "we have spent an incredible amount of time on Jackie." RP 2261:13-19.[5]

First, the Wuths do not attempt to defend the trial court's untenable decision to admit and instruct the jury to consider this evidence to "assess the opinion" of the Wuths' own experts. Rule 705 is not a "backdoor" for a party to use its expert to introduce inadmissible evidence. *See* Br. 46.

Second, with respect to showing they would have terminated the pregnancy, the trial court admitted the Jackie evidence without undertaking to balance relevance and prejudice. The Court: "I know, but, folks, if you fight your way through a summary judgment motion to take proximate cause to the jury, you take the good with the bad." RP (10/24/13) 281:23-25. Despite the testimony of the Wuths' medical expert

[5] The trial court even permitted the Wuths to introduce testimony about Brock Wuth's late aunt, Patsy, whom he never met and about whom the judge ruled "the jury can't draw any medical conclusions." RP (10/24/13) 278:4-13; *see also id.* 275:13-21.

that it would be improper to compare Oliver to Jackie, the Wuths were permitted to introduce side-by-side comparisons for each year of Oliver's life. RP 2779:15-2781:15; Trial Ex. 7.6. The jury saw a day-in-the-life video of Jackie taken years ***after*** Oliver was born, purportedly to establish the Wuths' state-of-mind ***before*** he was born. RP 5304:2-21. Similarly, the Wuths offered the after-the-fact testimony of Jackie's mother praying for her daughter to predecease her. RP 5307:11-20.

Because Oliver's prognosis cannot be forecast based on Jackie's condition, the court erred as a matter of law. In any event, by misapplying the standard for expert evidence, and punishing defendants for opposing summary judgment by allowing the Wuths to spend "an incredible time on Jackie," the trial court abused its discretion. *Justesen*, 121 Wn. App. at 94-96 (remanding for new trial to correct abuse of discretion).

C. Other Legal Errors Also Require a New Trial.

1. The Trial Court Erred by Granting Summary Judgment on Elizabeth Starkey's Agency.

Disputed issues of fact require reversal of the trial court's summary adjudication that Elizabeth Starkey was Valley's apparent agent. Determining the existence or nonexistence of an agency relationship is a distinctively fact-specific inquiry. *O'Brien v. Hafer*, 122 Wn. App. 279, 281, 93 P.3d 930 (2004). As the Wuths acknowledge, a hospital is liable

for conduct of only those individuals the hospital itself "holds out as its agents." Resp. 63. Here, the Wuths' summary judgment declarations—testifying that Ms. Wuth "thought the genetic counselor who called" to report the LabCorp test results "was employed by Valley," CP 751 and that Mr. Wuth "always assumed" the person who called "was a Valley employee," CP 754—are controverted by their prior deposition testimony. *See* CP 948 (59:14-15) ("I have no idea who it was that I talked to"); CP 955 (29:11-14) (Wuths did not "know who she got the phone call from," because "[t]hat wasn't important to us at the time"). The trial court improperly resolved evidentiary conflicts in favor of the moving party.

The Wuths also argue that this Court should affirm the trial court's purported summary judgment ruling that Ms. Starkey was Valley's ***actual*** agent as "its borrowed servant." Resp. 63 (citing CP 1111). But Judge McCullough's order concluded only that Ms. Starkey was Valley's "ostensible/ apparent agent"—***not*** a borrowed servant. CP 1111. Whether joint agency exists also generally requires an individualized fact finding. *Becerra v. Expert Janitorial, LLC*, 181 Wn.2d 186, 194 (2014). Because Judge McCullough did not find Ms. Starkey to be a borrowed agent, the Wuths have no basis to apply the borrowed servant doctrine here.

Relying on the summary judgment order, the court instructed the jury as a matter of law that Valley was responsible for Ms. Starkey's

conduct as its agent, improperly facilitating the vicarious liability theory. CP 11616 (Inst. 13). The Court should reverse the verdict.

2. The Trial Court Improperly Skewed the Jury Panel.

Contrary to the Wuths' assertion, Resp. 36-40, adoption of a "'death qualification' procedure" to identify and exclude jurors with a "bias against abortion" changed the composition of the jury in violation of RCW 2.36.080(1). CP 4457-59, 4455:20-4456:4. For example, the Wuths were required to establish each defendant was a "proximate cause" of the parents' decision to "take the pregnancy to term." CP 11607-09 (Inst. 6). But the trial court in examining jurors instead created the mistaken impression jurors would be required to adjudicate whether the Wuths had the "right to terminate the pregnancy." RP (10/22/13 pm) 14:17-19; *see also* RP (10/21/13) 179:11-14 ("exercise the option to terminate"); RP (10/21/13) 215:21-23 ("lost their ability to terminate").

Similarly, as to damages, the jury's function was to assess the Wuths' emotional distress of having given birth to a child with deficits versus the "emotional benefits to the parents from his birth." CP 11619-20 (Inst. 16). The right to an abortion plays no role in the damages calculation; under both scenarios the child comes to term. Again, the trial court described the role of the jury to evaluate whether to award "a lot of compensation" for "not having the right to an abortion." RP (10/21/13)

224:2-6; *see also* RP (10/22/13 pm) 17:21-18:2 ("entitled to recover" for "remedy" which was "lawful").

The flawed process used by the trial court removed jurors who stated that regardless of their personal beliefs they would nevertheless follow the law. For example Juror No. 10, responding to defense questions, stated three separate times he could follow the court's instructions. RP 180:7-181:11. The trial court then interrupted the examination to state the Wuths wanted to "collect damages" for "not being able to terminate" (*id.* at 181:12-16) and to express her personal doubts he could follow her instructions: "I'm having trouble, because I know how strongly you feel about termination. The damage here is the inability to terminate." RP 182:6-9. Although the juror again expressed his ability to follow instructions, RP 183:8-9, after further questioning the court excused the juror over defense counsel's objection. RP 185:5-20. The Wuths left no doubt about their tactical goal of excluding even jurors who could follow the court's instructions despite their personal beliefs. As they explained, empanelling "pro-lifer[s]" who "profess an ability to follow the law" would deprive the plaintiffs "from having a fair trial." CP 5943. The court improperly furthered that goal of excluding jurors based on their personal beliefs, even if they could follow instructions.

Contrary to plaintiffs' contention, Resp. 36, defendants objected to

death panel qualification of the jurors, CP 4699-4702; objected to the improper removal of jurors, *see, e.g.*, RP 185:5-7; 234:17; and objected to the court's misleading "shortcutting." RP (10/22/13 pm) 74:22-75:4.[6] The Wuths also suggest the protections of RCW 2.36.080 do not extend beyond the selection of the original pool. Resp. 39. The Wuths rely on selectively quoting from Valley's post-trial brief. *Id.* (citing CP 14137). In any event, the statute itself states "[t]his section does not affect the right to peremptory challenges under RCW 4.44.130." The Wuths' statutory construction would render this provision nonsensical because peremptory challenges do not occur until after selection of the original pool of jurors.

3. The Misapplication of CR 30(b)(6) Excluded Evidence Rebutting the Wuths' Corporate Negligence Claim.

Granting the Wuths' motion in limine, the court ruled testimony by Valley's 30(b)(6) designees who provided non-expert, factual testimony on topics related to the Wuths' corporate negligence claim was binding. CP 10815. The court repeatedly instructed the jury this prior testimony was irrefutable: "To the extent that testimony provided in the 30(b)[6] deposition in this case conflicts with testimony provided by other staff people, the testimony in the deposition controls." RP 2357:1-9; *see also id.* 2692-93; RP 3014:13-18 ("How many times do I have to say the

[6] Page 43 of Valley's opening brief incorrectly referenced the 10/22/13 am transcript. This citation should also replace the reference to RP (10/21/13 pm 3:19-10:1) cited at page 42.

30(b)(6) controls over the conflicting testimony? I've told the jury that several times now. . . . That's the cost of a 30(b)(6) designation.").

On appeal, the Wuths do not contest the trial court erroneously applied the Rule. The testimony of a Rule 30(b)(6) 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); instead, like any another other deposition testimony, "if altered, [it] may be explained and then explored through cross-examination." *Id.* The Wuths also concede the ruling resulted in the improper weight and exclusion of important testimony regarding corporate negligence. Resp. 68-69 (describing exclusion of Valley's non-designee testimony that contradicted its designated witness' testimony and rebutted the Wuths' "scheduling" allegations). The Wuths instead suggest that if the trial court had issued the order in limine as a "discovery sanction," ***which it did not***, it would not have been an "abuse of discretion." Resp. 68 (citing *Casper v. Esteb Enters., Inc.*, 119 Wn. App. 759, 768 (2004)). But the order and instructions to the jury were not issued as a sanction; instead, they were based on the trial court's mistaken legal ruling that such testimony is a binding admission as the "cost of a 30(b)(6) designation."

For the reasons set forth in Valley's and LabCorp's briefs, this Court should reverse the judgment and remand for a new trial.

RESPECTFULLY SUBMITTED this 23rd day of February, 2015.

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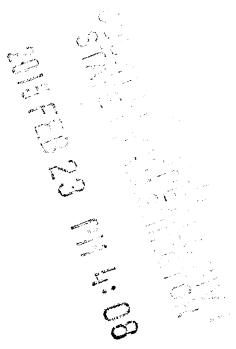
CERTIFICATE OF SERVICE

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.



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