NO. 95173-0

SUPREME COURT OF THE STATE OF WASHINGTON

L.M., a minor, by and through his Guardian ad Litem
WILLIAM L.E. DUSSAULT,

Appellant,

vs.

LAURA HAMILTON, individually and her
marital community; LAURA HAMILTON LICENSED
MIDWIFE, a Washington business,

Respondents.

APPELLANT'S REPLY TO RESPONDENT'S ANSWER

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I. PETITIONERS' REPLY

Petitioners respectfully offer the following reply. The Petitioners ask that the Court consider this reply. This reply was inadvertently miscalendared to be filed 30 days after receiving the answer.

A. The Trial Court's Reversed Itself Seven Days Before Trial And Prejudiced Levi's Ability To Ask For A *Frye* Hearing

Respondent claims that Levi is precluded from appealing the failure of the trial court to conduct a *Frye* hearing. The case cited by respondent does not hold that a party waives a challenge to such a failure to conduct a *Frye* hearing. There is only a footnote.

The trial court's reversal of itself only seven days before trial severely prejudiced Levi's ability to ask for a *Frye* hearing. In addition, Washington law requires that the trial court determine whether the reasoning or methodology underlying the testimony is scientifically valid. *Anderson v. Akzo Nobel Coatings, Inc.,* 172 Wn.2d 593, 602 (2011). The parties cannot agree or waive the fact that a methodology is not generally accepted in the scientific community.

Furthermore, the petitioners have also challenged the Court's admission of the NFOL defense under ER 702, which requires an expert to have adequate scientific or medical foundation for their opinions. The "selective quotes" from the literature highlights the lack of scientific

methodology and foundation behind the NFOL defense. The petitioners will not repeat all of conclusions stated in the medical literature that more study is needed or that the study itself is a "nonsystematic study."

The quotations from the medical literature show that the methodologies used in the studies are not generally accepted in the scientific community and do not meet the *Frye* standard or the requirements of ER 702.

B. The Court Should Resolve The Conflicts Among The Courts Of Appeals Whether Tencer May Testify To Causation Or That An Injury Cannot Be Caused.

In the present case, the Court of Appeals went beyond affirming the trial court's decision admitting his testimony. Tencer now has *carte blanche* to testify about anything. If he can move freely from orthopedics to obstetrics, then there is no limit under ER 702 to his testimony or the testimony of anyone else with a Ph.D.

Again, the petitioners' "selective quotes" show that there was no scientific or medical basis to his opinions. He cannot rely on the medical literature, and then, form opinions that the medical literature says cannot be made. The forces he testified to cannot be known, according to the medical literature. The trial court recognized this at first.

The petitioners respectfully request that the Court accept review and reverse the Court of Appeals.

Respectfully submitted this 28th day of December, 2017.

OSBORN MACHLER

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CERTIFICATE OF SERVICE

I hereby declare that on this day I caused to be served via Email and E-Service, true and correct copies of the foregoing APPELLANT'S REPLY upon the following counsel of record:

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Dated this 28th day of December, 2017.

Jenine K. Michaelis, *Paralegal*

OSBORN MACHLER

December 28, 2017 - 10:31 AM

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