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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

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CAYDEN RICHTER, a minor, by and through his natural  
parents, SARAH ANN RICHTER AND TYSON  
RICHTER, SARAH ANN RICHTER, individually, and  
TYSON RICHTER, individually,  
*Appellants,*

v.

KEVIN HARRINGTON, M.D., and GENERATIONS  
OB/GYN, PLLC, et al.,  
*Respondents.*

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Appeal from the Yakima County Superior Court  
Hon. Michael G. McCarthy

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**BRIEF OF RESPONDENTS**

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## I. INTRODUCTION

This appeal by the plaintiffs below challenges a defense verdict in favor of defendants Kevin Harrington, M.D. and his practice, Generations OB/GYN, PLLC (“Respondents”), against the claim of medical malpractice in the delivery of plaintiff Cayden Richter, a minor, and his parents, the Appellants herein. The case was tried to a jury between June 11 and 19, 2018, before the Hon. Michael G. McCarthy. The jury found that Dr. Harrington was not negligent but had fully complied with the standard of care of an obstetrician practicing in the state of Washington in April of 2013 after considering the testimony, the exhibits, and hearing closing arguments.

On appeal, Appellants identify two rulings as to which they claim error. The first relates to the rejection of one challenge for cause by Appellants in jury selection, and the second to an evidentiary ruling on the scope of admission of expert testimony. Both decisions are reviewed for an abuse of discretion. Yet Appellants fail to cite a single analogous case on either issue that reversed because the errors they complain of were outside the trial court’s acceptable options. There was no abuse of discretion.

While Appellants are unhappy with this result, they had their day in court and do not complain that they were not able to present their case or cross-examine at length, or that the jury was misled by incorrect instructions. The jury verdict in favor of Dr. Harrington should be affirmed.

## II. RESTATEMENT OF ISSUES

1. Did the trial court abuse its discretion in jury selection when it denied the Appellants' challenge to a juror for cause?
2. Did the trial court abuse its discretion in permitting Mark Scher, M.D. to offer the expert medical testimony to the jury?

## III. COUNTER STATEMENT OF FACTS<sup>1</sup>

Kevin M. Harrington, M.D. is a board certified OB/Gyn, who has practiced medicine in Yakima, Washington since 1982. Anderson-RP 281-282. Sarah Richter chose Dr. Harrington as her doctor for her pregnancy of Cayden Richter, changing from Dr. Roger Rowles who had been her OB/Gyn, because Mrs. Richter had heard Dr. Harrington "was more natural". Anderson-RP 168-169. At Dr. Harrington's first visit with Sarah and Tyson Richter, they reviewed Mrs. Richter's history. Anderson-RP 289. This history included Mrs. Richter having a prior emergency cesarean section after being induced at 40-and-a-half weeks and experiencing hemorrhaging diagnosed as placental abruption. Anderson-RP 289-290. With the 2012-2013 pregnancy, Mrs. Richter wanted to try a vaginal delivery after cesarean (VBAC) so that she could deliver naturally. Anderson-RP 290.

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<sup>1</sup> Because two different court reporters covered the trial and each began their RP with page 1, transcripts are referred to as "Anderson-RP \_\_\_\_" and "Bell RP \_\_\_\_."

The labor and delivery of Cayden Richter began through the artificial rupture of membrane by Dr. Harrington. Anderson-RP 369. Mrs. Richter gradually went into active labor. Anderson-RP 369. Cayden Richter started out the labor process in the occiput posterior (OP) position, and when coming down the birth canal, rotated to the occiput anterior (OA) position. Anderson-RP 379.

On delivery of Cayden Richter's head, there was an apparent shoulder dystocia. Anderson-RP 374. A shoulder dystocia is when there is the initial delivery of the head, but gentle downward traction by the obstetrician does not allow the anterior shoulder of the baby to slip beneath the symphysis. Anderson-RP 376. When a shoulder dystocia is recognized, the obstetrician tells the mother to stop pushing so that the baby's shoulder does not further wedge behind the symphysis, and the obstetrician stops the application of traction on the baby's head. Anderson-RP 376. When a shoulder dystocia happens, an announcement is made to the room because this is an obstetric emergency. Anderson-RP 376.

Sarah and Cayden Richter's obstetric emergency was managed, primarily, through what is known as the McRoberts maneuver. Anderson-RP 374. The McRoberts maneuver basically hyperflexes the thighs of the mother to pull the mother's pelvis up and rotate the symphysis up and out of the way, so that the baby can fully deliver. Anderson-RP 377. Once the

baby's shoulder is released, the obstetrician resumes gentle traction to deliver the baby. Anderson-RP 377.

For Cayden Richter, the shoulder dystocia was diagnosed, the room was notified, the mom assumed the McRoberts maneuver position, and the baby was delivered in 50 seconds. Anderson-RP 377.

In addition to Dr. Harrington testifying on his own behalf, the defense called Aaron Caughey, M.D., PhD. Dr. Caughey is a Professor and Department Chair for the Department of Obstetrics and Gynecology at Oregon Health Sciences University. Anderson-RP 409-410. He is double boarded in obstetrics and gynecology, as well as maternal fetal medicine. Anderson-RP 410. Dr. Caughey serves as the Vice Chair of the American College of Obstetrics and Gynecologists (ACOG), which is the nationwide entity that develops practice bulletins that offers guidelines on care to practitioners. Anderson-RP 413-414. Dr. Caughey also serves on the United States Preventive Services Task Force, which reviews evidence regarding preventive care for all disciplines of medicine for our country. Anderson-RP 414.

At trial, Dr. Caughey described the process of a baby going through the birth canal, and that this process stretches the nerves in the neck. Anderson-RP 416-417. The first stage of labor is when the mom is contracting and the cervix is dilating. Anderson-RP 417. The second stage

of labor is when the cervix is fully dilated and the head is being pushed down into the birth canal. Anderson-RP 417. During delivery, there will also be stretch on the neck. Anderson-RP 417. Stretch on the neck, and therefore on the nerves of the brachial plexus, occurs all through the course of labor and delivery. Anderson-RP 417. Brachial plexus injuries have been seen with c-sections, which means the injury is known to occur in the first stage of labor before there is any provider-applied traction. Anderson-RP 417. In other words, shoulder dystocia is not needed for a child to have a brachial plexus injury. Anderson-RP 417.

In this case, the baby moved from occiput posterior (OP) position to occiput anterior (OA) position, which caused stretch on the neck. Anderson-RP 418. Dr. Caughey described that this is an abnormal way for the fetus to navigate the maternal pelvis. Anderson-RP 420. Dr. Caughey has been part of studies done relative to babies moving from the OP to OA positions. Anderson-RP 419. OP babies often have longer labors than OA babies; OP babies often have longer second stages. Anderson-RP 420. Studies have shown that OP babies have a higher rate of brachial plexus injuries despite having a lower risk of shoulder dystocia. Anderson-RP 420. The stretch of the brachial plexus nerves occurs in the rotational process. Anderson-RP 420.

Dr. Caughey testified that Dr. Harrington met the standard of care in the labor and delivery of Cayden Richter, and that there was no evidence to suggest that anything other than Dr. Harrington meeting the standard of care was true. Anderson-RP 421. Dr. Caughey testified that Cayden Richter's brachial plexus injury was the result of stretch on the brachial plexus that occurred in the second stage and/or during delivery. Anderson-RP 422. In this case, there was no evidence to suggest that Dr. Harrington used excessive lateral traction. Anderson-RP 422. Maternal forces, in and of themselves, do cause brachial plexus injuries. Anderson-RP 423. In this case, the baby moving from the OP position to OA position with the torsional force being greater than normal, which would cause greater stretch on the nerves of the neck. Anderson-RP 423. In reviewing the case, Dr. Caughey testified that Dr. Harrington did everything correctly and within the standard of care. Anderson-RP 425.

The defense also called Steve Brisbois, M.D., who is the current Medical Director for the Providence Sacred Heart Medical Center in Spokane doing minimally invasive gynecology and robotic surgery. Anderson-RP 213. Until January of 2018, Dr. Brisbois was also the Chief of Women's Services. Anderson-RP 213. As Chief of Women's Services, Dr. Brisbois was responsible to ensure that safe and appropriate care was provided in the hospitals, review unexpected outcomes, and establish

credentialing criteria as well as making sure that the physicians were properly credentialed and competent to practice. Anderson-RP 214. As Chief of Women's Services, Dr. Brisbois also ensured that the obstetricians and obstetric staff maintained their skill sets. Anderson-RP 241. For this, the hospital had a simulation committee with simulation lab and simulator to train obstetric care providers how to manage situations, such as what to do when they encountered shoulder dystocia. Anderson-RP 214-215.

Dr. Brisbois testified that Dr. Harrington "absolutely" met the standard of care. Anderson-RP 219. Dr. Harrington did not injure Cayden Richter when he resolved the shoulder dystocia. Anderson-RP 219. The injury to Cayden Richter was not the result of Dr. Harrington using excessive lateral traction. Anderson-RP 219.

Dr. Brisbois explained to the jury that maternal forces are a combination of forces related to uterine contractions and forces generated by the mother pushing. Anderson-RP 236. Although the following did not occur to Cayden Richter, to give the jury an understanding of the power of maternal forces, Dr. Brisbois talked about babies being born with misshapen heads, swollen and bruised heads, encephala hematomas, retinal hemorrhaging, as well as skull fractures, broken clavicles and shoulders. Anderson-RP 232-233. Dr. Brisbois explained that these are all injuries that

occurred before the baby's head is delivered, and, therefore, they are the result of maternal forces of labor. Anderson-RP 233.

Dr. Brisbois also described that in normal deliveries (this was not a normal delivery because it was complicated by the shoulder dystocia) there is trauma as a result of the labor and delivery process, and discussed injuries to the mother that he has seen. Anderson-RP 227-228. Dr. Brisbois described that mothers will break their tailbones, separate their symphysis, as well as have bruising of their vaginal sidewalls, and tearing of the vagina. Anderson-RP 228.

Dr. Brisbois has seen brachial plexus injuries without shoulder dystocia. Anderson-RP 234. He has also seen brachial plexus injuries in the down arm in which there would be no traction applied, but an injury still occurs. Anderson-RP 234.

In the labor and delivery of Cayden Richter, Dr. Brisbois testified that Dr. Harrington did exactly what an obstetrician is trained to do when responding to a shoulder dystocia. Anderson-RP 240. Dr. Brisbois explained that Dr. Harrington did not use excessive lateral traction. Anderson-RP 244. Dr. Brisbois further explained that there is no evidence that Dr. Harrington used excessive lateral traction, with this being a relatively easy shoulder dystocia that resolved in 50 seconds. Anderson-RP 245.

Dr. Brisbois also described to the jury that at birth, Cayden Richter had bruising on his body and face, with the significance of this being the forces of labor, the forces of the mother pushing and the uterine contractions, caused trauma to this baby. Anderson-RP 252.

The jury also heard from Mark Scher, M.D., who is a tenured Full Professor in Pediatrics and Neurology in the Department of Pediatrics at Rainbow Babies and Children's Hospital, which is connected to the University Hospitals in Cleveland, Ohio. Anderson-RP 310. Dr. Scher practices as a pediatric neurologist, with a focus on maternal care and neonatal and fetal care. Anderson-RP 311.

In his work as a pediatric neurologist, Dr. Scher works with obstetricians. Anderson-RP 315. As a pediatric neurologist, Dr. Scher consults with families, and when the child has a brachial plexus injury, Dr. Scher must be prepared to answer the questions of the families as to why the injury happened. Anderson-RP 316.

At trial, Dr. Scher offered opinions on Cayden Richter's vulnerability in the labor and delivery process. Anderson-RP 320. Dr. Scher testified that in the second stage of labor, when Cayden Richter was moving from the OP position to OA position, the brachial plexus was stretched. Anderson-RP 328-329. Dr. Scher also offered testimony on Cayden Richter's brachial plexus injury and its relationship to Cayden's

APGAR scores that indicated diminished muscle tone, lack of oxygenation, and hypotonia, which all put the baby at risk for a brachial plexus injury. Anderson-RP 330-332. Dr. Scher also testified, from a neurologic standpoint, that a shoulder dystocia lasting 50 seconds, coupled with Cayden Richter's presentation at birth, were clinical indications that the cause of Cayden's brachial plexus injury occurred in the second stage of labor. Anderson-RP 332-333. Finally, Dr. Scher testified on the relationship of biologic variation and brachial plexus injuries, and the role this played in Cayden Richter's injury. Anderson-RP 334-335. Dr. Scher was cross-examined at greater length than his direct testimony (*see* Anderson-RP 335 - 360), including on the basis for his opinion, as described in more detail *infra*.

#### **IV. RESPONSE ARGUMENT**

##### **A. Standard of Review.**

The standard of review for the juror challenges for cause is manifest abuse of discretion, as Appellants note at pp 13-14 of their Opening Brief ("OB"). Rather than making its own *de novo* decision, the appellate court must defer to the trial court's decision. *See State v. Noltie*, 116 Wn.2d 831, 840, 809 P.2d 190 (1991).

The standard of review for the admission of expert testimony is abuse of discretion, as Appellants note. OB, p. 14. Indeed, all evidentiary

rulings are a matter of discretion by the trial court and will not be upset on review absent an abuse of discretion. *McKee v. Am. Home Prods. Corp.*, 113 Wn.2d 701, 706, 782 P.2d 1045 (1989).

**B. The Trial Court Did Not Manifestly Abuse Its Discretion In Denying Appellants' Challenges Of Jurors For Cause.**

When reviewing trial court rulings on challenges to jurors for cause, the appellate court must take the evidence in the light most favorable to the prevailing party and accept the trial judge's decision regarding the credibility of the prospective juror, as well as the trial judge's choice of reasonable inferences. *Ottis v. Stevenson-Carson School District No. 303*, 61 Wn.App. 747, 756, 812 P.2d 133 (1991).

For example, in *Dean v. Group Health Co-op. of Puget Sound*, 62 Wn.App. 829, 816 P.2d 757 (1991), the trial court in the medical malpractice action rejected an argument that the plaintiff should receive a new trial because, during deliberations, one of the jurors indicated a financial interest in the outcome when she stated that a verdict for the plaintiff could affect her own health insurance premiums. The appellate court held that the trial court had already concluded that the juror remained unbiased and that was a factual determination that would not be "reweighed" on appeal. *Dean*, 62 Wn.App. at 838.

As with other factual determinations made by a trial court, the appellate courts defer to the judge's decision in deciding whether to grant

or deny a juror challenge for cause based on bias. *State v. Jordan*, 103 Wn.App. 221, 11 P.3d 866 (2000). Trial judges are given broad discretion in applying the facts to the law governing challenges for cause, and will be reversed only for abuse of discretion. *State v. Frederiksen*, 40 Wn.App. 749, 700 P.2d 369 (1985).

In voir dire, the trial court must allow counsel sufficient latitude in questioning prospective jurors and provide counsel with a sufficiently informed basis to exercise challenges. *See Rowley v. Group Health Co-op of Puget Sound*, 16 Wn.App. 373, 566 P.2d 250 (1976). The scope of questioning is left to the discretion of the trial judge.

Judge McCarthy has served on the Yakima County Superior Court bench since 2008 after serving on the Yakima County District Court bench since 2001. In this case, Judge McCarthy did not abuse his discretion in making his rulings on counsels' challenge of a juror for cause.

The grounds for challenging a prospective juror are based on statute. RCW 4.44.160 specifies the general causes of challenge. The statute states:

General causes of challenge are:

(1) A want of any of the qualifications prescribed for a juror, as set out in RCW 2.36.070.

(2) Unsoundness of mind, or such defect in the faculties of the mind, or organs of the body, as renders him or her incapable of performing the duties of a juror in any action.

RCW 4.44.160.

Grounds for challenging a prospective juror are also identified in RCW 4.44.170 and RCW 4.44.180. RCW 4.44.170 states:

Particular causes of challenge are of three kinds:

(1) For such a bias as when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this code as implied bias.

(2) For the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging, and which is known in this code as actual bias.

(3) For the existence of a defect in the functions or organs of the body which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the party challenging.

RCW 4.44.170.

The next statute, RCW 4.44.180, defines implied bias:

A challenge for implied bias may be taken for any or all of the following causes, **and not otherwise**:

(1) Consanguinity or affinity within the fourth degree to either party.

(2) Standing in the relation of guardian and ward, attorney and client, master and servant or landlord and tenant, to a party; or being a member of the family of, or a partner in business with, or in the employment for wages, of a party, or being surety or bail in the action called for trial, or otherwise, for a party.

(3) Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, or in a criminal action by the state against either party, upon substantially the same facts or transaction.

(4) Interest on the part of the juror in the event of the action, or the principal question involved therein, excepting always, the interest of the juror as a member or citizen of the county or municipal corporation.

RCW 4.44.180 (emphasis added).

Washington statutes also establish what constitutes a challenge for actual bias:

A challenge for actual bias may be taken for the cause mentioned in RCW 4.44.170(2). But on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon what he or she may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.

RCW 4.44.190.

In this case, when conducting voir dire of the 88 prospective jurors within the panel, Judge McCarthy started with the question of whether any potentially sitting juror would have a hardship being involved in the case. The jurors that articulated a hardship were excused. Bell-RP 5-30.

Next in the voir dire process, the attorneys and parties were introduced to the panel. Bell-RP 31. The trial court asked if anyone knew the Plaintiffs: Sarah Richter, Tyson Richter, or Cayden Richter, with jurors, 44, 3, and 5 identifying that they knew the Richters. When questioned individually if this familiarity would affect their ability to be fair, each individual juror stated that he or she could be fair. Bell-RP 31-32. Judge

McCarthy then asked the panel if anyone knew Dr. Harrington. Bell-RP 32. The following jurors identified a familiarity with Dr. Harrington: 42, 29, 61, 3, 11, 22, 52, 56, 57, 77, 84, and 58. Bell-RP 32 and 35. When asked if the familiarity with Dr. Harrington would affect the individual juror's ability to be fair, if the juror responded "yes", that juror was excused without further inquiry. Bell-RP 33-35. Jurors 3, 11, 42, 52, 61 were excused. Bell-RP 33-35.

Judge McCarthy then instructed the jurors to fill out a 3 page questionnaire that probed the jurors' knowledge of:

- the parties,
- the potential witnesses,
- the attorneys,

and asked the following questions:

- "Have any of you, your family members, or your close friends had difficulty with a pregnancy, and/or labor and delivery? If yes, please explain:"
- "Have any of you, your family members, or your close friends suffered from a birth-related injury? If yes, please explain:"
- "Have any of you, your family members, or your close friends been patients of Dr. Harrington or Generations OB/GYN, PLLC? Other providers at Generations OB/GYN, PLLC include:
  - o Anna Dufault, M.D.
  - o Leslie McLemore, M.D.
  - o Carly Ingalls, M.D.
  - o Seana Moore, ARNP
  - o Lindsey Moore, ARNP
  - o (recently retired) Roger Rowles, M.D.

If yes, please explain:

- “Do any of you have feelings or opinions about Dr. Harrington, the above-named providers, or Generations OB/GYN, PLLC? If yes, please explain:”
- “Have you, your family member, or anyone close to you, believed that a medical provider improperly cared for you? If yes, please explain who, what happened, the types of illness/injury incurred, whether you or that person(s) recovered, and whether you or that person filed a lawsuit: If yes, please explain:”
- “Is there any reason you feel you cannot be a fair juror on this case? \_\_\_\_\_ Yes \_\_\_\_\_ No If yes, please explain:”
- “Would you like the opportunity to respond to additional questions regarding any of your answers to this questionnaire outside the presence of other jurors? \_\_\_\_\_ Yes \_\_\_\_\_ No”

Supp. CP \_\_\_\_; Bell-RP 35-36.

The completed questionnaires were reviewed by the attorneys, and the trial court engaged the attorneys as to which jurors should be spoken to individually. Bell-RP 37. Counsel for Defendants identified that Jurors 26, 44, and 75 requested that they be questioned outside the presence of the other jurors. Bell-RP 37-38. The Court identified that Jurors 30 and 34 were not comfortable with the English language. Bell-RP 38. Counsel for Defendants also identified a list of jurors who stated they could not be fair: 8, 34, 2, 50, 87, and 88. Bell-RP 38.

Counsel for Plaintiffs requested excusal of all jurors who had a child delivered by Dr. Harrington.

MR. LEVINE: Sure, I mean, I don't know if it helps to circumvent the process at all, but I know some people completely can't sit on this. ... Your Honor, anyone whose baby Dr. Harrington delivered shouldn't be jurors in this case.

COURT: Okay.

MR. LEVINE: I can't imagine how anyone whose baby he delivered could possibly be fair. I mean, some of them -- some of them wrote down on the form apparently delivered their children that they could be fair. I don't know how that's -- I don't know how, so --

THE COURT: Well, if they delivered, you know, the child 24 years ago then --

MR. LEVINE: But that's not possible. It's just not possible. There's no way a juror can sit on the case with the defendant who delivered their child --

THE COURT: Well --

MR. LEVINE: -- and not have some feeling for the man. I don't care if it was a hundred years ago, Your Honor --

THE COURT: Okay.

MR. LEVINE: -- (unintelligible) possible.

THE COURT: Well, let me hear from the defense.

MS. MURPHY: I don't see that that can be a justification for cause. I mean, there's a lot of people that know people. If they say they can be fair, they can be fair and we have to live with it.

MR. LEVINE: Your Honor, I want a fair trial. I want a fair trial and I'm not (inaudible -- loud noise) and I'll put it on the record that he's not going to get a fair trial if jurors sit in this trial who he delivered their babies. To suggest somehow -- suggest that a person can sit in the trial who's had professional interaction with the doctor who he delivered their child. To suggest somehow they can put that aside is against every tenant of human nature possibly known to mankind and would never in a million years provide the plaintiff with a fair trial.

THE COURT: All right. Well, what are the numbers of those people? I mean, I'm not -- I'm fine with having them come in and at least, you know, talk to them outside the presence of the jury and see what they have to say.

MR. LEVINE: I understand, Your Honor, it's No. 25, 56, 57, 84 ....

Bell-RP 39-40.

On appeal, Plaintiffs-Appellants argue that it was error for the Trial Court not to excuse Juror No. 25, who is identified as "Juror No. ?" in the Bell-RP. The questioning of Juror No. 25 by the Trial Court and the attorneys, and the Court's ruling are reproduced below.

THE COURT: .... So apparently Dr. Harrington delivered your son.

JUROR NO. ?: Yes, he delivered my second son.

THE COURT: Okay, and when was that?

JUROR NO. ?: 14 years ago.

THE COURT: Okay. **And is that going to cause you to be less than fair and impartial in this matter?**

JUROR NO. ?: **No.**

THE COURT: **Okay. Are you confident of that?**

JUROR NO. ?: **Yes.**

THE COURT: Okay. All right. Mr. Levine, do you have any inquiries?

MR. LEVINE: Oh, thanks. Good afternoon, sir, how are you? (Unintelligible). Just -- you know, when we start these cases we like to have -- kind of a level spot (inaudible -- coughing) starts at the same zero (inaudible).

JUROR NO. ?: Yes.

MR. LEVINE: Do you think the fact that you had -- now Dr. Harrington delivered your son, were you happy with the care he gave to you?

JUROR NO. ?: Yes, I was very happy.

MR. LEVINE: All right.

JUROR NO. ?: Yes.

MR. LEVINE: So, the fact that he delivered your son and you were happy and do you think he's a good doctor?

JUROR NO. ?: Uh, yes.

MR. LEVINE: Do you think he's good competent doctor?

JUROR NO. ?: Uh, at the time, yes.

MR. LEVINE: Right.

JUROR NO. ?: Yes.

MR. LEVINE: But you'd be happy -- you'd have to sit at the trial and hear allegations that he was not a good doctor in this case.

JUROR NO. ?: Correct, I understand.

MR. LEVINE: All right.

JUROR NO. ?: Yes.

MR. LEVINE: You don't think that since you think he's a - - you already start off this process knowing him and thinking he's a good doctor there, don't you?

JUROR NO. ?: Yeah, yeah.

MR. LEVINE: So don't really --

JUROR NO. ?: It was 14 years ago, though, but yeah, I understand what you're saying.

MR. LEVINE: You didn't really start at zero in this case do you?

JUROR NO. ?: I understand this.

MR. LEVINE: All right. So don't you think that the fact that, you know, you're here to sit in judgment of someone who you already believe is a good doctor, has already given you good care. You don't think that puts you a little bit on the other side of flat?

JUROR NO. ?: Uh, I could agree with that a little bit, yeah.

MR. LEVINE: Yeah. I mean, you don't really start off zero like all the other people who may --

JUROR NO. ?: Yes, I understand that.

MR. LEVINE: Like for example, you don't start at the same spot. You don't start at the same spot as some that didn't know him at all?

JUROR NO. ?: Yeah.

MR. LEVINE: You're not in the same category, isn't that right?

JUROR NO. ? : Correct.

MR. LEVINE: All right, okay. Thanks.

JUROR NO. ? : Yep.

THE COURT: Ms. Murphy.

MS. MURPHY: **Did the questions that Mr. Levine ask[ed] you change your answer to the Judge's question of whether you were confident you could be fair?**

JUROR NO. ? : No.

MS. MURPHY: **Still confident you could be fair.**

JUROR NO. ? : **Yes, I'm very confident I could be fair.**

MS. MURPHY: And it looks like from your questionnaire that you filled out that your first son that your ex-wife had, that was a medical emergency.

JUROR NO. ? : Yeah, that was very traumatic, yes.

MS. MURPHY: Okay. Do you hold that against the medical community or doctors internal [sic - in general]?

JUROR NO. ? : Uh, the doctors maybe that delivered, yes. I was very, very upset with her.

MS. MURPHY: Okay.

JUROR NO. ? : But I mean not in all doctors in general, no, just hers. She was -- did very poor.

MS. MURPHY: Okay. **So it sounds like you're willing to listen to the facts of the particular case and determine based on the facts whether you're going to decide one way or another?**

JUROR NO. ? : **Yes, correct.**

MS. MURPHY: Okay. I don't have further questions.

THE COURT: All right. Thank you, sir. Go ahead and accompany the bailiff back -- or down to Courtroom 5. And I think as we discussed on Friday if there's going to be a challenge for cause you need to make it.

MR. LEVINE: Well, I'll make it right now, Your Honor. It's not the only -- it's not the only possible that makes (unintelligible) sit in this jury.

THE COURT: Let me tell her

(Loud noises)

MR. LEVINE: It's -- the essence of the system to have a fair trial for either side is we start at the same level playing field. You know with that guy, it's not humanly possible to think that someone who starts off liking the doctor. He believes that this is a competent doctor who did a good job with his child, is a good doctor. He starts off with that thought. He needs to start off at zero. He starts off at a different position and once I -- I mean, I didn't want to press him and be too difficult, but it didn't take me very long, about three questions, to get the guy to admit that he was not going to be as everybody else would be in this trial starting off. There are plenty of people, but Your Honor, we can argue about the people that are patients of the practice. You know, we can argue about the people that, you know, were patients of Dr. McLemore or Dr. Rowles or, you know, people. We can argue about that but we should not be arguing at all about anyone who was a patient of the actual doctor who's been sued in this case. I can't imagine a situation where that person could in fact start the trial as every other juror at the same level, so I would move again -- you know, for him and it's just -- I mean, I'm saying this stuff now because I know I'll be saying it again and I don't want to belabor the point every time, but I would move for cause because it didn't take me more than three or four questions to get the guy to say, well, yeah, I really don't think I'm quite like everybody else and, yeah, I do think he's a good guy, so I would move for cause.

THE COURT: Ms. Murphy

MS. MURPHY: Judge (inaudible -- loud noises) condition for striking a juror for cause. The threshold condition is for a juror to be articulating, you know, I can't be fair, I can't sit here. I can't listen to the evidence and this juror did exactly that. I'm confident I could be fair and then he proceeded to say that he's had a medical negligence experience in his life that he understands, well, that's specific to that. This is specific to this and so I would ask the Court to deny Mr. Levine's motion.

THE COURT: Well, I make the distinction here between somebody who's had a recent experience with Dr. Harrington and somebody who has not. In this instance, we're talking about something that happened 14 years ago, an uneventful birth of a baby and as Mr. Halaba (phonetic) repeatedly said. He was talking about this experience from years past and that he had a good experience with Dr. Harrington 14 years ago. I think making the point that this case is not something that happened 14 years ago and this is a matter that's going to have to stand on its own merits. And so I'm going to deny the motion that he be excused for cause. ...

Bell-RP 51-56 (Emphasis added).

In support of their argument that the Trial Court erred in not excusing Juror No. 25, Appellants referenced the Trial Court's excusal of Juror No. 56. With regard to the questioning of Juror No. 56, it was established that Dr. Harrington delivered both of Juror No. 56's children, with the youngest child being 13 years old. Bell-RP 81-82. The basis stated by the Trial Court to support its ruling for the excusal of Juror No. 56 is instructive on the issue of the claimed error on appeal.

THE COURT: It was, it was a number of years ago but she also has an ongoing relationship with the practice. She sees the nurse practitioners on a yearly basis and I also note when she first sat down, she looked at Dr. Harrington and gave him a big smile. So I think she's sincere. I also think that she's -- I don't know if misguided is the right term, but I also think that it puts her in a very different position that would be very hard for her to not incorporate her experience in her ongoing relationship with the practice. So I'm going to go ahead and excuse her for cause.

Bell-RP 88.

Appellants also identified the excusal of Juror No. 57 by the Trial Court as an argued basis to support their claim of error. Through the voir

dire process, Juror No. 57 identified that Dr. Harrington delivered a child of hers four years ago. Bell-RP 89. In excusing Juror No. 57 for cause, the Trial Court held:

THE COURT: It's only been four years. It's very easily distinguished from the situation where it's been 13 years or 20 years or a lengthy period of time. Under the circumstances I think it's appropriate for me to excuse Ms. Mears for cause, 57.

Bell-RP-93.

In Washington, there is an established difference between implied bias and actual bias.

#### **1. Implied Bias**

Starting with implied bias, the law presumes that each juror sworn is impartial and above legal exception. *See State v. Persinger*, 62 Wn.2d 362, 382 P.2d 497 (1963). Under RCW 4.44.170 and 4.44.180, however, a prospective juror may be challenged for implied bias, which means a challenge that there is a condition or relationship from which a bias for or against a party is conclusively inferred. The first inquiry to determine if there is implied bias is to ask whether there is a relationship between the juror and the parties that is close enough to create in the juror, consciously or unconsciously, a special interest in the success of either party. The relationships that have this effect are enumerated in RCW 4.44.180. When a relationship enumerated by RCW 4.44.180 is present, bias in the mind of

the prospective juror is conclusively presumed. A relationship identified by state statute under RCW 4.44.180 is not present in this case. Therefore, bias cannot be conclusively presumed in this case.

In their Opening Brief at pp. 16-17, Appellants cite and rely on *Family Medical Bldg., Inc. v. State, Dept. of Social and Health Services*, 37 Wn.App. 662, 684 P.2d 77 (1984). Their reliance on this case is misplaced. This case helps show that implied bias is not at issue in this case. The holding in *Family Medical Bldg., Inc.* is:

...the State asserts the court erred when it denied its motion in limine to exclude from the jury patients of the doctors/owners of FMB. Of the 12 jurors, seven either had a patient relationship with the doctors or had a family member with such a relationship.

RCW 4.44.180 specifies certain relationships between a potential juror and a party from which the law implies bias. In those instances, actual bias need not be shown. They include “Standing in the relation of guardian and ward, attorney and client, maters and servant or landlord and tenant, to the adverse party; ... *or otherwise* ...” (Italics ours.) RCW 4.44.180(2). **We hold the doctor/patient relationship is not included in RCW 4.44.180(2) by virtue of the language “or otherwise”.** The relationships enumerated in the statute are those in which the potential juror (1) entrusts another with authority to make decisions on his behalf, or (2) has some pecuniary interest which may be affected by a party. The doctor/patient relationship does not fall under either category. Hence the court did not err when it refused to exclude the doctors’ patients from the jury panel as a matter of law.

Nor can it be said the court abused its discretion when it determined that exclusion of all such jurors was unnecessary to provide the State a fair forum. A juror’s faith in his doctor’s medical judgment does not translate into unquestioned faith in the doctor’s business judgment, absent specific facts which

indicate otherwise. If the State had elicited such facts in voir dire, then it could have challenged the juror for actual bias, pursuant to RCW 4.44.170(2).

*Family Medical Bldg., Inc. v. State, DSHS*, at 675-676 (*affirmed* in part, *reversed* in part, and *remanded* for a new trial on damages by *Family Medical Bldg., Inc. v. State, DSHS*, 104 Wn.2d 105, 702 P.2d 459 (1985). Relative to the above holding by the Court of Appeals, the Supreme Court held: “Finally, the State contends that jurors were improperly paneled .... **None of these claims have merit**”. 104 Wn.2d at 114-115 (Emphasis added)).

Appellants are arguing that “the Trial Court erred in not excluding all of the persons from juror service that Dr. Harrington had delivered the children of”. Opening Brief, p. 18. Thereafter, the phrase “implicit bias” is used a couple of times on page 19 of the Opening Brief. It therefore appears that Appellants are arguing that RCW 4.44.180 and implied bias required exclusion of these jurors from the panel. That argument is inconsistent with state statute and case law.

## 2. Actual Bias

If Appellants are arguing the trial court erred in not excusing for cause Juror No. 25 for actual bias, that claimed error should be denied, and the ruling of the trial court affirmed.

RCW 4.44.170 and 4.44.190 are the statutes that guide a prospective juror being challenged for actual bias, i.e., a claim that there exists a state of mind that would prevent the prospective juror from acting as a fair and impartial juror in the case at hand. Actual bias for or against either party is any bias in the mind of the juror that would render it difficult or impossible for the juror to be fair and impartial. Actual bias must be established by evidence produced on the examination, by the usual question and answer procedure, or in any other method permitted under the customary laws of evidence. Unlike implied bias, actual bias must be established by proof.

Reasonable latitude must be given to counsel on the voir dire examination, but it must be remembered that the trial court has, and must have, a large measure of discretion. On appeal, the party challenging the trial court's decision on the objection must show more than a mere possibility that the juror was prejudiced. *See State v. Stackhouse*, 90 Wn.App. 344, 957 P.2d 218 (1998) and *State v. Noltie*, 116 Wn.2d 831, 809 P.2d 190 (1991).

A definite opinion in the mind of the juror as to any of the facts in issue, which the court feels the juror could not disregard, is a disqualification. In addition to opinions derived from sources out of court, prospective jurors may be shown to have fixed and definite prejudices or beliefs relating to matters that will be an issue in the case, which would

render them unfair as jurors. By contrast, a lightly held opinion or a mere impression that does not rise to the dignity of an opinion is not a disqualification. Similarly, a mere acquaintance with someone involved in the case, alone, is usually insufficient to disqualify a juror.

For example, in *State v. Noyes*, 69 Wn.2d 441, 418 P.2d 471 (1966), the denial of defendant's challenge for cause of a prospective juror who lived in the same neighborhood with the deceased, had known the deceased, and had discussed the facts of the murder case with at least two persons subsequent to the first trial was held to not be error when the juror stated that she could lay these experiences aside and give defendant a fair trial. *See, Noyes* at 446.

Considerable light will be thrown on the fairness of a juror by the juror's character, mental habits, demeanor under questioning, and all other data which may be disclosed by the examination. A judge with some experience in observing witnesses under oath becomes more or less experienced in character analysis, in drawing conclusions from the conduct of witnesses. The way they use their hands, their eyes, their facial expression, as well as their frankness or hesitation in answering are all matters that do not appear in the transcribed record of the questions and answers. They are available to the trial court in forming its opinion of the impartiality and fitness of the person to be a juror. The appellate courts that

do not have the benefit of this evidence recognize the advantageous position the trial court is in and gives it weight in considering any appeal from its decision. Unless it very clearly appears to be erroneous, or an abuse of discretion, the trial court's decision on the fitness of the juror will be sustained. *State v. Noltie*, 116 Wn.2d 831, 809 P.2d 190 (1991).

**3. Judge McCarthy Did Not Manifestly Abuse His Discretion in ruling on the juror challenges for cause.**

The voir dire process began with all jurors who answered "yes" to the question of whether their familiarity with any party to the litigation would affect their ability to be fair being excused without additional inquiry.

Judge McCarthy is an experienced judge who regularly observes witnesses testifying under oath. He is observant of juror's character, mental habits, and demeanor under questioning. This is demonstrated in his ruling that resulted in Juror No. 56 being excused, when Judge McCarthy noted on the record that Juror No. 56 walked into court and gave Dr. Harrington a "big smile".

Juror No. 25 repeatedly answered that he was confident that he could be fair and impartial. He further answered under oath that he would listen to the facts of the particular case to decide the matter. Juror No. 25 discussed that he is aware of bad medicine and good medicine having experienced both.

On this claimed error, this Court is required to defer to the trial court's decision as to Juror No. 25. Judge McCarthy's application of the facts to the law governing challenges for cause should be affirmed.

**C. The Trial Court Did Not Abuse Its Discretion In Ruling On The Admission of Expert Testimony.**

The trial court is to exclude testimony from unqualified experts and testimony that is unhelpful to the jury. *See Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 918, 296 P.3d 860 (2013). However, as evidentiary rulings are a matter of trial court discretion, its decision will not be upset on review absent an abuse of discretion. *McKee v. Am. Home Prods. Corp.*, *supra*, 113 Wn.2d at 706.

Appellants claim that the trial court erred in permitting Dr. Scher to testify, asserting Dr. Scher lacked sufficient expertise to comment on the nature of how Cayden Richter was injured. The facts and authorities set forth below, show that the court did not abuse its discretion in allowing Dr. Scher's testimony because the complaints went to the weight of his testimony, not its admissibility. Dr. Scher was cross-examined at length by Appellants, as described *infra*, giving the jury the fullest possible look at why his testimony should be minimized or disregarded.

On direct examination, Dr. Scher described his education, training, practice, and qualifications. Dr. Scher is a tenured full professor in pediatrics and neurology in the department of pediatrics, working at

Rainbow Babies and Children's Hospital, which is connected to University Hospitals in Cleveland, Ohio. Anderson-RP 310. Dr. Scher practices as a pediatric neurologist, with a focus on maternal care and neonatal and fetal care, which Dr. Scher characterized as a concentration on fetal and neonatal neurology. Anderson-RP 311. Dr. Scher described that in the aspect of his practice devoted to the fetus and neonate, he is often called by a multidisciplinary group, usually the maternal fetal medicine specialist, to give families advice on their unborn children. Anderson-RP 311-312. Dr. Scher then counsels these families on the fetal period and after birth, and will follow the children through adulthood. Anderson-RP 311-312.

Dr. Scher attended medical school at State University in New York, graduating in 1976. Anderson-RP 312. His medical training then included a two-year pediatric Residency at New York Hospital, which is connected to Cornell Medical Center. *Id.* He was eligible to sit for the pediatric boards, which he passed, and then went into training for pediatric neurology. *Id.* Dr. Scher trained in Minnesota with a pediatric neurology mentor for two years to be able to sit for the boards in competency in child neurology. Anderson-RP 312-313. Dr. Scher was interested in fetuses and neonates, and continued his training at Stanford between 1981 and 1983 where he worked specifically with a neonatologist and a child neurologist interested in newborns. Anderson-RP 313.

Dr. Scher is board certified in pediatrics, neurology with special competence in child neurology, and clinical neurophysiology for the study of brainwaves. Anderson-RP 313.

In his work as a pediatric neurologist, Dr. Scher works with obstetricians. Anderson-RP 315. He is in contact with obstetricians and maternal fetal medicine specialists who request that Dr. Scher be involved prenatally and see the babies after birth. Anderson-RP 315. Although not an obstetrician, to understand the nervous system, brain, spinal cord, and nerves, Dr. Scher must think about what happens to the baby in labor and delivery. Anderson-RP 315. Understanding the cardinal movements [engagement, descent, flexion, internal rotation, extension, external rotation, and expulsion of the baby through the birth canal and vagina] is necessary for the work Dr. Scher does. Anderson-RP 315-316. As a pediatric neurologist, Dr. Scher consults with families, and when the child has a brachial plexus injury, Dr. Scher must be prepared to answer their questions of why the injury happened. Anderson-RP 316. Although Dr. Scher is not an obstetrician, he delivered babies in medical school. Anderson-RP 315.

Dr. Scher offered testimony in response to a question about his opinions on Cayden Richter's long-term quality of life. Anderson-RP 319. Dr. Scher also offered opinions on Cayden Richter's vulnerability in the

labor and delivery process. Anderson-RP 320. While offering these opinions, counsel for Appellants requested a hearing outside the presence of the jury. Anderson-RP 320. The jury left the courtroom, and the trial court heard argument on Appellants' counsel's objection to Dr. Scher testifying on the movement of the baby from OP to OA and the stretch on the brachial plexus. Anderson-RP 321. After hearing the arguments of counsel, the trial court ruled that "[t]his isn't some type of esoteric area of where only an obstetrician can testify about the process of birth. This isn't something, you know, that's beyond the scope of the doctor's area of expertise. ... He's talking about the process of birth." Anderson-RP 324. After further argument from counsel, the trial court held "I think he can testify to a limited amount about the process of birth". Anderson-RP 325. The trial court inquired as to the scope of further questioning. Anderson-RP 325. The representation was made by the defense that Dr. Scher would be asked questions about "[t]he second stage, the pushing stage, the baby was OP and moved to OA. I will make the representation to your Honor that I believe Dr. Scher will testify that that process is when the stretching of the brachial plexus occurred." Anderson-RP 326. Further argument of counsel ensued. Anderson-RP 326-327. The court ruled:

All right. As I've indicated, I don't think the area that the doctor is going to testify about is something that is so esoteric that it's peculiarly within the knowledge of an obstetrician or to the exclusion of anybody else. He works in the field. He treats

children who are in utero and after birth. I think he has sufficient qualifications to talk about this area of medicine. Your objection goes to the weight and not the admissibility.

Anderson-RP 327.

Dr. Scher completed his answer about the second stage of labor and the relationship of Cayden Richter moving from OP to OA and the brachial plexus injury. Anderson-RP 328-329. Dr. Scher also offered testimony on this child's brachial plexus injury and the baby's APGAR scores that indicated diminished muscle tone, lack of oxygenation, and hypotonia that put the baby at risk for a brachial plexus injury. Anderson-RP 330-332. Dr. Scher also testified, from a neurology standpoint, about the shoulder dystocia lasting 50 seconds and the presentation of the baby at birth and how those clinical indications relate to the understood cause of Cayden Richter's brachial plexus injury. Anderson-RP 332-333. Finally, Dr. Scher testified on direct examination on the relationship of biologic variation and brachial plexus injuries. Anderson-RP 334-335.

Dr. Scher was subject to extensive cross-examination. Anderson-RP 335-360. He was examined on his medical-legal work and characterized as a "professional expert witness" having testified in approximately 20 states, starting this type of work in 1984. Anderson-RP 335-336. Testimony was elicited that Dr. Scher has never testified at trial that a provider used excessive lateral traction. Anderson-RP 336. Counsel for Plaintiffs

questioned Dr. Scher on the representation that he has earned more than \$6 million doing expert witness work, and that he earns \$200,000 a year through his work as a medical-legal expert. Anderson-RP 339. Further, testimony was offered that Dr. Scher testifies 80% for defense and 20% for plaintiff. Anderson-RP 339.

Dr. Scher was questioned on his testimony about the timing of Cayden Richter moving from the OP to OA position, and he agreed that he did not know when this occurred and that this would be an obstetrical opinion. Anderson-RP 341-343. Counsel for Plaintiffs then asked Dr. Scher questions on obstetrical issues and asked Dr. Scher to describe how doctor-applied excessive lateral traction caused brachial plexus injuries. Anderson-RP 343-345. Within the context of this line of questioning, Dr. Scher offered testimony, from the perspective of a pediatric neurologist, on how a baby is injured as a result of provider-applied excessive lateral traction on the head. Anderson-RP 345. Dr. Scher agreed that an injury resulting from provider-applied excessive lateral traction can occur quickly. Anderson-RP 346.

Dr. Scher was questioned by counsel for Plaintiffs on fetal hypoxia and agreed that in the vast majority of births of children this is an adaptive process that avoids injury, but in this case, it is his opinion that fetal hypoxia contributed to Cayden Richter's injury. Anderson-RP 348. Dr. Scher was also cross-examined on fetal hypotonia and that tone cannot be measured

during labor and delivery, and there was no mention that Cayden Richter had hypotonia within the medical records. Anderson-RP 348-349.

Dr. Scher was questioned on cross-examination as to his testimony offered on direct examination about Cayden Richter's bruising at birth and the significance of that. Anderson-RP 349-351. Dr. Scher was questioned on blood gas, which measures the balance of acid and base in the bloodstream, and is an indication of how well the tissues are using oxygen and glucose. Anderson-RP 351. Dr. Scher agreed that there was no blood gas test performed with Cayden Richter because the baby was not so ill at birth that he needed to be resuscitated. Anderson-RP 352-353. Dr. Scher was further questioned about Cayden Richter's APGAR scores, and how the APGAR scores are interpreted relative to Cayden Richter's wellbeing and whether that supported Dr. Scher's opinions on Cayden's vulnerability to a suffer a brachial plexus injury. Anderson-RP 353-354.

Counsel for Plaintiffs also questioned Dr. Scher on biological variance, and whether there was evidence within the medical records to support whether or not Cayden Richter had a biological variance that made him susceptible to a brachial plexus injury. Anderson-RP 354-357. Dr. Scher agreed that the described floppiness of babies at birth in most cases is protective, but that in the case he was testifying that floppiness was a feature of why Cayden Richter suffered the injury, but that he cannot

identify why for Cayden Richter the floppiness was not protective. Anderson-RP 357-358. Dr. Scher was further questioned as to whether or not there was anything within the medical record that indicated any oddity of Cayden Richter's nerves that would make Cayden susceptible to an injury, for which there was none. Anderson-AP 358-360.

All this was laid bare for the jury to examine and evaluate fully, which is their appointed role. This was normal jury trial practice.

“The scope of an expert’s knowledge, not his or her professional specialty, governs “ ‘the threshold question of admissibility of expert medical testimony in a malpractice case.’ ”” *Leaverton v. Cascade Surgical Partners, P.L.L.C.*, 160 Wn.App. 512, 517, 248 P.3d 136 (2011) (citing *Hill v. Sacred Heart Med. Ctr.*, 143 Wn.App. 438, 445, 177 P.3d 1152 (2008), which was quoting, *Pon Kwock Eng v. Klein*, 127 Wn.App. 171, 172, 110 P.3d 844 (2005)). “A physician with a medical degree is qualified to express an opinion on any sort of medical question, including questions in areas in which the physician is not a specialist, so long as the physician has sufficient expertise to demonstrate familiarity with the procedure or medical problem at issue in the ... action.” *Id.*

Appellants assert at page 20 of their Opening Brief that “[d]espite not being noticed as an expert witness with respect to standard of care and being unqualified to give an expert opinion on obstetrics, the Trial Court

allowed Dr. Scher to give testimony as to an obstetrical opinion that Cayden was injured during his movement in the birth canal during the delivery from the occiput posterior position to an occiput anterior positions. ARP 328.” However, Defendants’ Disclosure of Potential Trial Witnesses stated that “Dr. Scher is a pediatric neurologist, who may be called to testify on issues related to standard of care, causation, and damages.” CP 34.

As Judge McCarthy correctly noted, the subject matter Dr. Scher testified about was not something so esoteric that it was peculiarly within the knowledge of an obstetrician to the exclusion of other medical doctors. Dr. Scher works in the field. He is a pediatric neurologist with a focus on maternal care and neonatal neurology. Dr. Scher treats babies while in utero and after birth. Judge McCarthy did not abuse his discretion in ruling that Dr. Scher is sufficiently qualified to talk about the area of medicine that he testified to at the time of trial. Appellants had ample opportunity to demonstrate to the jury any inadequacies in his testimony that may have existed. There was no error.

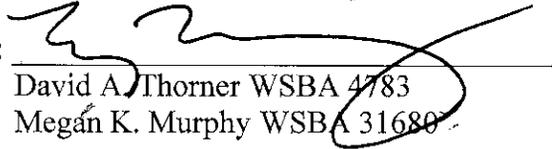
## V. CONCLUSION

The Trial Court did not abuse its discretion when it ruled on the challenge for cause against Juror No. 25, and did not abuse its discretion in permitting the testimony of Dr. Mark Scher.

Respondents Kevin Harrington, M.D., and Generations OB/GYN, PLLC, respectfully request the Court of Appeals affirm the rulings of the Trial Court in this matter.

RESPECTFULLY SUBMITTED this 7th day of June, 2019.

THORNER KENNEDY GANO & MURPHY P.S.

By: 

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*Attorneys for Respondents Kevin Harrington, M.D.,  
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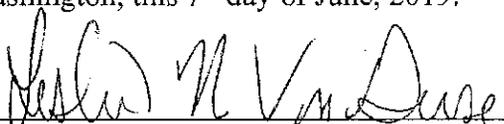
**PROOF OF SERVICE**

I, Leslie Van Guse, declare under penalty of perjury of the laws of the State of Washington that on June 7, 2019, I placed a copy of the Brief of Respondents to the below counsel as indicated:

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**DATED** at Yakima, Washington, this 7<sup>th</sup> day of June, 2019.

  
\_\_\_\_\_  
Leslie Van Guse, Secretary  
Thorner Kennedy Gano & Murphy P.S.

**THORNER KENNEDY GANO AND MURPHY PS**

**June 07, 2019 - 8:46 AM**

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