71497-0

71497-0

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

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

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

Plaintiffs-Respondents,

v.

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

Defendants-Appellants,

and

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

Defendants.

APPELLANT LABCORP'S REPLY BRIEF

Melissa O. White, WSBA #27668
Megan K. Kirk, WSBA #32893
Kevin A. Michael, WSBA #36976
COZEN O'CONNOR
999 Third Avenue, Suite 1900
Seattle, WA 98104
Telephone: (206) 340-1000

Anthony A. Todaro, WSBA #30391
CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP
1001 Fourth Avenue, Suite 3900
Seattle, WA 98154
Telephone: (206) 625-8600

Attorneys for Appellant LabCorp

E

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Regulations and Rules

I. INTRODUCTION

The Wuths try to sidestep the significant legal issues presented in this case by contending, inaccurately, that errors were not preserved and that all assignments of error should be reviewed under a deferential abuse of discretion standard. Applying the correct standard of review to the preserved issues leads to only one conclusion: compelling reasons necessitate reversal.

The jury was not given the option of allocating fault to Defendant Dr. James Harding despite testimony regarding his numerous breaches of the standard of care. Moreover, the trial court shielded Dr. Harding from critical opinions offered by other qualified experts. Instead of allowing the jury to consider the range of evidence, the trial court limited the jury's assessment of Dr. Harding to one narrow theory of liability that was hand-selected by the Wuths when they settled with him. Blame defaulted to the only other choices on the verdict form, *i.e.*, LabCorp and Valley. With regard to damages, the jury's $25 million award to the parents (who claimed mental anguish because of their worry about who would care for Oliver in the future, *i.e.*, a worry that all but evaporated the moment the jury awarded sums to care for Oliver that exceeded the amounts requested) can only be explained as the imposition of punitive "deterrence" damages as requested by the Wuths' trial counsel and endorsed by the trial judge.

The jury's inability to properly allocate fault to Dr. Harding (an issue that is intertwined with the erroneous exclusion of expert testimony) resulted in a fundamentally flawed liability allocation. The discussions of deterrence then led to the imposition of unauthorized punitive damages. These two components reflect egregious and troubling errors that separate this case from verdicts that are appealed to this Court as a matter of course. Reversal and remand for a new trial for the Wuths, LabCorp, and Valley[1] to address the intertwined issues of liability and damages is required.

II. ARGUMENT IN REPLY[2]

A. Errors Were Preserved and Issues are Properly Considered

1. A *De Novo* Standard of Review Applies to Most Issues

Most of the issues raised in LabCorp's appeal are purely legal questions.[3] Even so, the Wuths presuppose that this Court will treat this

---

[1] After Opening Briefs were filed, Dr. Harding advised this Court that the Wuths had released him (and his company, Obstetrix) from all claims and asked that this Court dismiss him as a party to this appeal—a request this Court ultimately granted. The briefing on that issue reflected a consensus that, in the event of a remand for a new trial, Dr. Harding would be listed on the verdict form as an "empty chair." *See* 11/6/14 Motion, 11/26/14 Answer, 12/3/14 Reply, 12/9/14 Ruling (Comm. Kanazawa).

[2] In order to avoid the need to seek leave to file an overlength brief, LabCorp focuses herein on selected arguments that are most responsive to LabCorp's issues as they are addressed in the Wuths' Brief. Resp. Br. at III.A.1, A.5, and C.1-5. By doing so, LabCorp does not waive any argument that was raised and preserved in its Opening Brief. Under RAP 10.1(g), LabCorp also joins in and adopts the following arguments made by Valley in its Reply Brief: Parts II.A.1 (deterrence damages); II.B.1 (speculative future expenses included in damages); III.B.2 (inadmissible evidence regarding other family members included in damages); and III.C.2 (skewed jury panel).

appeal as one that addresses only issues within the discretion of the trier of fact, and repeatedly urge this Court to apply a highly deferential standard and, after doing so, simply defer and affirm. *See* Resp. Br. at 32, 40-41, 45, 47, 49, 51-52, 53, 72, 75, 78, 79, 80, 81, 82, 86, 88-89. But our Supreme Court has made clear that questions of law are reviewed *de novo* with no deference to the trial court. *Mountain Park Homeowners Ass'n, Inc. v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994).[4]

In some instances, the Wuths affirmatively re-characterize issues in an attempt to avoid *de novo* review. For example, in response to LabCorp's challenges to the availability of general damages as a matter of law under *Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 656 P.2d 483 (1983), and *McKernan v. Aasheim*, 102 Wn.2d 411, 419, 687 P.2d 850 (1984),[5] the Wuths recast the issue as whether the trial court "abuse[d] its discretion in refusing to remit the jury's award of general damages." Resp. Br. at 45. Likewise, when addressing LabCorp's argument that the

---

[3] *See* LabCorp's Opening Br. at IV.B. (review of whether damages can be ascertained as a matter of law under theories of wrongful birth and wrongful life); *id.* at IV.C.1-2 (review of whether LabCorp was entitled to have the jury instructed on its theory of the case); *id.* at IV.C.3 (review of exclusion of evidence on summary judgment); *id.* at IV.C.4 (review of whether trial court errors were prejudicial or harmless error); *id.* at IV.D.1 (review of whether LabCorp was deprived of the right to defend itself); *id.* at IV.D.2 (determination of whether damages awarded constitute impermissible punitive damages); *id.* at IV.D.3 (determination of whether trial court errors were harmless).

[4] *See Limstrom v. Ladenburg*, 136 Wn.2d 595, 612, 963 P.2d 869 (1998) (confirming that *de novo* review applies to orders entered "based solely on documentary evidence, affidavits and memoranda of law"); *Robbins, Geller, Rudman & Dowd, LLP v. State*, 179 Wn. App. 711, 720, 328 P.3d 905 (2014) (where trial court's decision was not based on live testimony, appellate court is not bound by factual findings).

[5] LabCorp's Opening Br. at 18-22.

trial court misinformed the jury of the role of deterrence and improperly interjected punishment into this compensatory damages case,[6] the Wuths frame this issue as seeking review of the trial court's denial of post-judgment motions. Resp. Br. at 53. As the mere filing of a post-judgment motion does not transform legal issues that do not involve an assessment of live evidence in to questions of fact, the *de novo* standard applies.

2. LabCorp Did Not Fail to Plead, Waive Issues, or Invite Error

The Wuths also accuse LabCorp of failing to properly plead its allocation defense, neglecting to preserve issues, and inviting error. Resp. Br. at 26, 51, 82-83, 88-89. The record confirms that all defenses and errors were preserved, and are properly before this Court.

The Wuths ask this Court to ignore the issue of whether the trial court violated LabCorp's right to present its defense to the jury[7] by accusing LabCorp of failing to properly plead that fault should be allocated to Dr. Harding. Resp. Br. at 70. LabCorp's Answer to the operative complaint includes the following affirmative defense: "The incident in question resulted from the acts or omissions of persons or entities other than LabCorp for which LabCorp is in no way responsible or

---

[6] LabCorp's Opening Br. at 41-46.
[7] LabCorp's Opening Br. at 46; *id.* at 25-36.

liable." CP 2236. The Wuths' contention on appeal is that this language was insufficient because it is "vague." Resp. Br. at 71.[8]

Washington is a "notice pleading" state in which only "a short and plain statement of the claim" and a demand for relief is required to put a party on notice that claims are being asserted. *Putman v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wn.2d 974, 983, 216 P.3d 374 (2009) (quoting CR 8(a)). Moreover, a defense is treated as having been raised in the pleadings if that defense is consistently raised. *See Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 766-68, 733 P.2d 530 (1987). In this case, LabCorp's affirmative defense blamed other persons or entities (CP 2236), and it repeatedly and consistently asserted the fault of Dr. Harding through expert opinions, and evidence and argument submitted to the trial court. *See, e.g.*, CP 301-11, 2733-2833, 11250-95. There can be no serious dispute—and indeed the Wuths do not claim—that the parties lacked notice that LabCorp was seeking to allocate fault to Dr. Harding. Thus, LabCorp's affirmative defense was not waived.[9]

---

[8] To the extent the Wuths, and the trial judge, suggested that LabCorp was obligated to assert a cross-claim against Dr. Harding in order to allocate fault to him, this argument is without merit. Under RCW 4.22.070(1), "any party to a proceeding can assert that another person is at fault." *Mailloux v. State Farm Mut. Auto. Ins. Co.*, 76 Wn. App. 507, 511, 887 P.2d 449 (1995) (citing *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 25, 864 P.2d 921 (1993)); LabCorp's Opening Br. at 26-27.

[9] The authority the Wuths cite (*Dormaier v. Columbia Basin Anesthesia, PLLC*, 177 Wn. App. 828, 858, ¶ 48, 313 P.3d 431 (2013); CR 12(i); and *Adcox*, 123 Wn.2d 15) does not support a contrary conclusion. *See* Resp. Br. at 71. In *Dormaier*, a party was held to have waived a pleaded defense only after repeatedly disavowing it in the trial court.

Next, the Wuths claim that the trial judge's comments about deterrence to the jury during closing arguments were made "as LabCorp asked" and "*with ... LabCorp's approval.*" Resp. Br. at 51 (emphasis in original). The transcript from closing arguments confirms the opposite: LabCorp not only sought a standing objection to any mention of deterrence,[10] but also specifically objected to the "curative" instruction that the trial judge proposed—and ultimately gave—because it included a discussion of deterrence:

> THE COURT [after previewing language addressing the role of deterrence in the assessment of damages]: I think that's a sufficient curative instruction. Tell me, if you don't think it's sufficient, why.
>
> ***
>
> [LABCORP'S COUNSEL]: Your Honor, 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 5383-84.[11] Thus, the Wuths' representation that LabCorp asked for and approved of the trial judge's deterrence instruction is without merit.

Dormaier, 177 Wn. App. 858, ¶ 48. Court Rule 12(i), on its face, applies only to a defense asserting non-party fault, and thus it is inapplicable to LabCorp's assertion here that co-defendant Dr. Harding was at fault for the Wuths' injuries. And *Adcox* does not address pleading requirements, but rather the quantum of evidence supporting an allocation of fault. *Adcox*, 123 Wn.2d 15.

[10] RP 5254-55.

[11] In addition, before trial, LabCorp and Valley moved *in limine* for orders prohibiting arguments seeking damages based upon the "golden rule," a plea that jurors place themselves in the Wuths' position, sending a message, and punishing. CP 5890-91 (LabCorp's motion *in limine*); CP 4982 (Valley's motion *in limine*); CP 8724 (LabCorp's

The Wuths also suggest that this Court can avoid reviewing the trial court's exclusion of expert testimony criticizing Dr. Harding[12] under the "invited error" doctrine, under which a party that "sets up" an error at trial is not entitled to complain about it on appeal. Resp. Br. at 83 (citing *Casper v. Esteb. Enterprises, Inc.*, 119 Wn. App. 759, 771, 82 P.3d 1223 (2004)). Here, the Wuths point to an order *in limine* that precludes experts from testifying outside their areas of expertise as "proof" that there was a "set up." Resp. Br. at 83. But the issues raised by LabCorp are whether the trial court improperly excluded testimony from: (1) a qualified expert testifying on issues *within* her expertise; and (2) a proposed expert whose qualifications were never evaluated.[13] No error was invited.

Finally, the Wuths suggest that LabCorp waived the issue of whether it was improper for the trial judge to repeatedly comment to the jury that the Wuths were not at fault[14] because rulings that fault could not be allocated to the Wuths were not appealed. Resp. Br. at 88-89. LabCorp did assign error to the jury instruction that reiterated the Wuths' fault-free status, notwithstanding the verdict form that did not list them.[15] LabCorp

---

joinder in Valley's motion *in limine*); *see also* LabCorp's Opening Br. at 42-44 (describing deterrence discussions, repeated objections, and trial court rulings).

[12] *See* LabCorp's Opening Br. at 34-37 (describing the improper limitations imposed on testifying expert Dr. Robin Clark, and explaining why the error was not harmless).

[13] *See* LabCorp's Opening Br. at 29-37 (addressing Dr. London and Dr. Clark).

[14] *See* LabCorp's Opening Br. at 37-41.

[15] LabCorp's Opening Br. at 4 (assigning error to Jury Instruction #18, at CP 11622).

maintains that the trial judge erred by improperly influencing the jury's ability to assess the Wuths' credibility,[16] *i.e.*, an issue that is distinct from the contributory fault ruling.

As LabCorp properly pleaded and preserved issues, and did not invite error, the "technicalities" described by the Wuths do not provide a basis on which to avoid reaching the merits of LabCorp's issues.

3. The Facts Should be Considered in the Light Most Favorable to LabCorp on Certain Issues

The Wuths admit that they have presented disputed facts in the light most favorable to them, explaining that doing so is permitted by *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107-08, 864 P.2d 937 (1994). Resp. Br. at 2. *Burnside* did approve of such a standard, but only for the purposes of addressing a challenge to the sufficiency of the evidence because "inferences to be drawn from the evidence are for the jury and not for this court." *See Burnside*, 123 Wn.2d at 108. But most of the issues raised in this appeal do not involve inferences made by the jury

---

[16] *See* LabCorp's Opening Br. at IV.D.1. The record citation offered by the Wuths is an admission by the trial judge to counsel that she made repeated comments elevating the Wuths' character in a deliberate effort to influence the jury's assessment of their credibility: "I absolutely want to make this strong. I need to be redundant. ... I know [the verdict form gives the jury no way to apportion fault to the Wuths], but I still want to remind them [the jury]. You can't do it. They [the Wuths] bear no fault here. I've told them [the jury]. I think this is the hardest thing, always. Anybody who thinks about a bad thing that happens thinks about what the person who suffered it could have done to prevent it. It's just the way people think. We all think that way, because it [prevents] us from suffering what they suffered. ... It's stupid, but that's just what we think. ... I've got strong reasons to think I have to fight against the natural desire for jurors to attribute fault." RP 3936-37, *cited in* Resp. Br. at 89.

and, as such, the facts related thereto should not be viewed in a light most favorable to the Wuths.

In this Court's review of the order granting the Wuths' mid-trial request to dismiss LabCorp's allocation defense,[17] the facts must be viewed in the light most favorable to LabCorp, which was the non-moving party.[18] Likewise, the facts must also be viewed in the light most favorable to LabCorp in this Court's review of the pre-trial order striking Dr. London in connection with Dr. Harding's summary judgment motion.[19]

B. LabCorp Was Deprived of the Opportunity to Present its Case to the Jury

1. The Trial Court Erred When It Refused to Allow LabCorp to Allocate Fault to Dr. Harding

The trial court erroneously rejected LabCorp's affirmative defense when it ruled LabCorp could not submit its arguments regarding

---

[17] LabCorp's Opening Br. at 3 (AOE B.2); *id.* at 4 (assigning error to jury instruction 6, describing limited theory of fault that could be considered against Dr. Harding, at CP 11607-09); *id.* at 25-37 (IV.C.); CP 11122-32 (mid-trial request for dismissal of LabCorp's defense of allocation of fault to Dr. Harding based on theories other than the one the Wuths continued to pursue); CP 11250-95 (LabCorp's opposition); RP 5207 at 13-22 (trial court ruling that LabCorp could not allocate fault to Dr. Harding based on any theories of his negligence other than the claim asserted by the Wuths).

[18] *Jackson v. Peoples Fed. Credit Union*, 25 Wn. App. 81, 82-83, 604 P.2d 1025 (1979) ("It is axiomatic that when ruling on a motion for dismissal at the conclusion of [one party's] evidence, the court is required to consider all facts and inferences therefrom in a light most favorable to [the non-moving party].").

[19] *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 416, 150 P.3d 545 (2007) ("Trial court rulings in conjunction with a motion for summary judgment are reviewed *de novo*."); *see Folsom v. Burger King*, 135 Wn. 2d at 658, 663, 958 P.2d 301 (1998) (all reasonable inferences from the evidence must be resolved against the party moving for summary judgment).

Dr. Harding's fault for the Wuths' injuries to the jury. RP 5207 at 13-22.[20] One of LabCorp's key assertions against Dr. Harding was that by proceeding with Rhea Wuth's CVS and lab submission on a day when no genetic counselor was available, Dr. Harding assumed the role of the genetic counselor but breached the standard of care by failing to adequately perform that role.[21]

The Wuths ignore the evidence LabCorp relied upon in urging the trial court to allow this issue to go to the jury—including testimony presented during trial by the Wuths' expert, Dr. Marc Incerpi (a perinatologist), confirming that Dr. Harding was acting not only as the perinatologist for the Wuths but also as their genetic counselor, and that Rhea Wuth did not receive adequate genetic counseling from him. RP 2657. In addition Dr. Incerpi—and the Wuths' expert Dr. Robin Clark (director of prenatal diagnosis centers)—testified that the standard of care for Dr. Harding required him to ensure that all of the pertinent clinical information reached the lab.[22]

---

[20] RP 5207 at 13-22: "That's the plaintiffs' claim [of the only way Dr. Harding breached the standard of care], and that's all there is in this case. He either did it or he didn't."; *see* CP 11607-09.

[21] *See* LabCorp's Opening Br. at 28.

[22] *See* LabCorp's Opening Br. at 28 (citing RP 1100, 1190, 2634, 2637); *see also* CP 10750-51 (discussing Dr. Incerpi's testimony and additional evidence including testimony from the Wuths' expert Dr. Neil Kochenour (also a perinatologist) regarding Dr. Harding's failure to include necessary information regarding abnormal ultrasounds and history of spontaneous abortions).

Even without the additional evidence regarding Dr. Harding's breaches of the standard of care that LabCorp sought to introduce,[23] there was sufficient evidence for LabCorp's defense allocation theory to be presented to the jury. The trial court erred by preventing LabCorp from doing so. *See* RCW 4.22.070(1); *Mailloux*, 76 Wn. App. at 511. Therefore, reversal is required.

2. No Judge Ever Examined or Evaluated Dr. London's Qualifications

The expert LabCorp sought to introduce, Dr. Andrew London, M.D., opined that Dr. Harding violated the standard of care of a reasonably prudent maternal fetal medicine specialist by (1) ordering an incorrect test, (2) failing to provide the lab with all of the relevant clinical information in his possession, and (3) failing to read the report issued by LabCorp. CP 10988-89, 11014-41. Based upon his CV and deposition testimony filed in the record after he was excluded, Dr. London's experience and training more than exceed the standards set forth in ER 702 and 703 for him to offer these opinions.[24] CP 10988-89,

---

[23] LabCorp's requests to introduce such additional evidence were denied, as discussed *supra* in II. B.2–B.3.

[24] The Washington cases cited by the Wuths are consistent with these standards and do not compel a different result. Resp. Br. at 76 (citing *Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha*, 126 Wn.2d 50, 882 P.2d 703, 731 (1994), *as amended* (1994), *as clarified* (1995), and *Young*, 112 Wn.2d 216. *Queen City Farms*, 126 Wn.2d at 102, held that an expert with "no knowledge whatever" of the underwriting practices of the insurer was not qualified to testify as to whether misrepresentations by the policyholder were material. *Young* addressed the issue of whether a non-physician can provide expert

11014-41; CP 10992 (board-certified obstetrician and gynecologist since 1976 and Assistant Professor of Obstetrics and Gynecology at the Johns Hopkins School of Medicine); CP 10992 (experienced in co-managing high-risk patients with perinatologists, performing many amniocentesis procedures, generating reports from genetic tests performed on CVS samples, and referring patients for genetic counseling).

In response to LabCorp's description of procedural irregularities[25] that resulted in Dr. London being wrongly and prematurely excluded from testifying at trial (which served as one of the primary reasons that the trial court did not allow the jury to allocate fault to Dr. Harding on additional theories),[26] the Wuths claim that "LabCorp had plenty of notice and was repeatedly heard on the issue[.]" Resp. Br. at 72. They go on to claim that the trial court "found after substantial briefing and argument that Dr. London was not qualified by experience or training and that his opinion lacked a proper factual basis." Resp. Br. at 72. The record,

---

opinions about the standard of care of a physician, ultimately held that "[t]o allow a pharmacist's testimony on a physician's standard of care runs counter to public policy in the administration of justice in medical malpractice trials." *Young*, 112 Wn.2d at 230. *See Seybold v. Neu*, 105 Wn. App. 666, 19 P.3d 1068 (2001) (plastic surgeon allowed to testify as to the standard of care of an orthopedic surgeon specializing in musculoskeletal oncology); *Hall v. Sacred Heart Med. Ctr.*, 100 Wn. App. 53, 995 P.2d 621 (2000) (medical doctor permitted to testify as to the standard of care of an intensive care unit nurse); *Miller v. Peterson*, 42 Wn. App. 822, 832, 714 P.2d 695 (1986) (orthopedic surgeon could testify about podiatrist's standard of care so long as the surgeon and podiatrist used the same methods of treatment); *see also* LabCorp's Opening Br. at 33-37 (discussing standards for expert qualification).

[25] Attached hereto as Appendix A is a timeline of the filings, arguments, and rulings on the exclusion of Dr. London, including record citations and descriptions of same.

[26] LabCorp's Opening Br. at 29-34.

however, confirms that LabCorp was not heard on this issue and, moreover, that the basis for Dr. London's exclusion was not—and could not have been—his qualifications, experience, or training, as they were not before the trial court at the time he was excluded.

Eight days after the deadline for disclosure of witnesses, Dr. Harding filed a reply brief in support of his summary judgment motion that first raised the issue of Dr. London being stricken. CP 14291, 2905-25.[27] Although a section of that reply was titled "motion to strike," it addressed other experts without any mention of Dr. London. CP 2906-10. A passing reference on page 11 of the fifteen-page reply states that [Dr. London] should be stricken or disregarded." CP 2915. Dr. Harding explained that he was seeking exclusion of Dr. London's testimony "in conjunction with" the summary judgment motion, and—far from asking for exclusion of him at trial—merely asked that "references to snippets of generalized testimony" be stricken. RP 7/18/13, at 4, 7.[28] The sole basis for striking Dr. London's opinions was as follows: "[Dr. London] based his opinions on a hearsay lunch room conversation with unnamed participants." CP 2915. The "lunch room conversation" was referenced by Dr. London when asked if he had talked to people about this case

---

[27] *See* CP 2590-606 (summary judgment motion containing no mention of Dr. London).
[28] In Dr. Harding's discussion of Dr. London actually includes a reference to a separate motion *in limine* that addresses Dr. London's testimony *at trial*. CP 2915.

generally. *See* CP 11025. He never suggested that this was the basis for his opinions. CP 11014-41.

Although no other briefing or evidence regarding Dr. London was before the trial court, the trial judge ruled during the summary judgment hearing that Dr. London would be excluded "for now[.]" RP 7/18/13, at 48; CP 3141.[29] Instead of giving LabCorp, the non-moving party, a reasonable opportunity to show the existence of an issue of material fact that would defeat the request that Dr. London's testimony be stricken,[30] the trial court invited LabCorp to file a motion for reconsideration to more fully address the issue. RP 7/18/13, at 48. In doing so, the trial court shifted to LabCorp the burden of proving that the ruling "materially affected" its "substantial rights." CR 59(a).[31]

LabCorp filed a motion that was not resolved until more than a month after the close of discovery and the same day the case was

---

[29] The order (CP 3141) is included in Appendix C to LabCorp's Opening Brief.

[30] *See Cofer v. Pierce Cnty.*, 8 Wn. App. 258, 263, 505 P.2d 476 (1973) (explaining that the nonmoving party must be given a reasonable opportunity to show the existence of an issue of material fact in dispute that would defeat summary judgment).

[31] CR 59(a) provides, in part:

> **Grounds for New Trial or Reconsideration**. On the motion of the party aggrieved, ... any ... order may be vacated and reconsideration granted ... for any one of the following causes materially affecting the substantial rights of such parties....

It is well-settled that motions for reconsideration are one-sided and disfavored. *See* King County L.Civ.R. 59(b); *see generally* W.D. Wash. L.Civ.R. 7(h) ("Motions for reconsideration are disfavored. The court will ordinarily deny such motions in the absence of a showing of manifest error ....").

transferred to a new judge for trial that started just one week later.[32] The prior judge's order included a cryptic handwritten note referring back to "the precise language of" the summary judgment order that initially struck Dr. London. CP 6383-86.[33] Although a motion *in limine* to exclude Dr. London was filed, the trial judge ruled on it after announcing that she did not consider the evidence or arguments based upon her mistaken belief that the prior judge had already done so. RP 10/23/13, at 23-24 ("[The prior judge] ruled, and I'll tell you, folks, [o]nce he's ruled, you folks are stuck with his ruling[.]").[34] Although the trial judge allowed LabCorp to file an offer of proof that discussed qualifications and proposed expert opinions (CP 10986-11000), she announced: "I won't be reading it[.]" RP 3469.

It is undisputable that no judge examined Dr. London's qualifications or his criticisms of the many ways that Dr. Harding

---

[32] The reconsideration order was entered on October 14, 2013, which was more than a month after the September 3, 2013 discovery cutoff date, and just one week before the October 21, 2013 trial date. CP 14291, 6383. The Wuths' suggestion that LabCorp should have anticipated the need for and obtained a new expert ignores (1) the fact that the witness disclosure cutoff date was eight days before Dr. Harding requested Dr. London's exclusion on summary judgment, (2) discovery cutoff occurred on September 3, 2013, more than a month before the reconsideration order was entered on October 14, 2013, and (2) Dr. London's exclusion *for trial* was not anticipated or confirmed until rulings were issued on motions *in limine* on October 23 and 28, 2013, which was the eve of trial. *Id.*; RP 10/23/13, at 23-24; CP 8794-98.

[33] The order (CP 6383) is included in Appendix C to LabCorp's Opening Brief.

[34] Given these comments, it is apparent that briefing on this issue, though filed, was never considered by the trial court. As such, the fact that LabCorp might have been given "another opportunity to brief the issue" (as the Wuths contend, Resp. Br. at 74) does not support their contention that LabCorp "was repeatedly heard on the issue" or that the trial court made findings "after substantial briefing and argument[.]" Resp. Br. at 72.

breached the standard of care. In a case relied upon heavily by the Wuths, *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 229, 770 P.2d 182 (1989), our Supreme Court noted that "a physician must demonstrate that he or she has sufficient expertise in the relevant specialty" in order to be qualified to testify that a physician specialist breached the standard of care. *Young* underscores the fact that whether the expert's training and experience provide sufficient background to provide a particular opinion must be considered before an expert is prevented from testifying.

As Dr. London's exclusion was the product of legal errors, imposition of an incorrect burden of proof, and involved no credibility assessments or weighing of evidence, LabCorp was deprived of its right to a jury trial without an opportunity to be heard. *See* Wash. Const. art. I §21. The ruling excluding Dr. London "for now"[35] was made as requested in the summary judgment context, meaning the testimony was necessarily stricken for purposes of summary judgment and not for trial.[36] As such, the ruling is reviewed *de novo*. *Davis*, 159 Wn.2d at 416.[37] The later trial

---

[35] RP 7/18/13, at 48; CP 3141.

[36] *See Cameron v. Murray*, 151 Wn. App. 646, 658, 214 P.3d 150 (2009) (distinguishing evidence submitted to the trial court in connection with a motion for summary judgment from evidence that is removed from consideration by a jury).

[37] To the extent the summary judgment evidentiary ruling can be viewed as a *sua sponte* exclusion for trial, the standard of review is abuse of discretion. *See Fraser v. Beutel*, 56 Wn. App. 725, 734, 785 P.2d 470 (1990). Where, as here, the trial judge offers a reason that is "contrary to law" and goes to "the weight of the opinion testimony" within the province of the jury, it constitutes an abuse of discretion that necessitates a new trial. *Id.*

judge's *in limine* ruling that excluded Dr. London from testifying at trial[38] is reviewed for an abuse of discretion. *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, ¶16, 333 P.3d 388 (2014). The refusal to exercise any discretion, however, constitutes an abuse of discretion. *See Bowcutt v. Delta N. Star Corp.*, 95 Wn. App. 311, 320, 976 P.2d 643 (1999).

No matter the reason, the result is the same: a remand is necessary so that Dr. London's qualifications and opinions can be properly evaluated[39] and presented to the jury during trial. *See Davis*, 159 Wn.2d at 420 ("Washington favors resolution of issues on the merits."). Considering that Dr. London's testimony provides an abundance of support for LabCorp's defense of fault allocation to Dr. Harding, and that the trial judge made the allocation decision based upon her (incorrect) recollection that there was a lack of expert evidence presented to support Dr. Harding's other breaches of the standard of care,[40] this issue was of critical importance to LabCorp. The Wuths do not even attempt to argue

---

[38] RP 10/23/13, at 23-24; CP 8794-98.

[39] In *Nissen v. Obde,* our Supreme Court explained why remand is required when a trial court places the burden of proof on the wrong party:

> Since it is the function of the trial court and not of this court to consider the credibility of witnesses and to weigh the evidence in order to determine whether it preponderates in favor of the party having the burden of proof, we are convinced that the proper course for us to follow is to remand.

55 Wn.2d 527, 529-30, 348 P.2d 421 (1960), *quoted in State v. Coley*, 171 Wn. App. 177, 191, 286 P.3d 712 (2012), *rev'd on other grounds*, 180 Wn.2d 543, 326 P.3d 702 (2014).

[40] RP 5207 at 13-22: "[T]he only standard-of-care evidence I have heard with respect to Dr. Harding has to do with whether or not he [violated the standard of care as alleged by the Wuths]. That's it." RP 5208 at 12-15: "I won't allow further imputation of fault to Dr. Harding because there isn't any expert evidence to support it."

that the error in excluding the evidence was harmless, which is not surprising as it is not irrelevant, unduly prejudicial, or cumulative.[41]

3. No Judge Ever Examined Dr. Clark's Qualifications to Offer Opinions Critical of Dr. Harding

LabCorp reasonably expected to have the opportunity to explore the full range of the Wuths' experts that were called to testify at trial—and neither the trial court, nor the Wuths nor Dr. Harding, ever gave them notice that this was incorrect. *See* 7/18/13 RP 21:20-22:1.[42] It was not until the eve of trial in late September 2013 that the Wuths and Dr. Harding informed LabCorp that they had entered into a secret settlement and agreed to narrow the claims the Wuths had been prosecuting against Dr. Harding. In their brief to this Court, the Wuths repeatedly state that their settlement with Dr. Harding was not a secret, claiming that it was not "reached" until on September 27, 2013. Resp. Br. at 85; *id* at 28.[43] There is no evidence in the record to support such a contention. As noted in LabCorp's Opening Brief, the agreement's terms

---

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

[42] 7/18/13 RP 221:20-222:1: "[LabCorp's counsel:] The plaintiffs have care experts, and they have not stricken those experts. If Robin Clark comes to testify, . . . we're going to have the opportunity in listing them on our witness list as well to explore the full range of their opinions, including the opinions that implicate a violation of the standard of care for Harding."

[43] The fax banner bearing the September 27, 0213 date merely evinces that it was faxed from Dr. Harding's office on that date. CP 14219-22. It is undated and no evidence was presented as to when the terms were negotiated or when the settlement was "reached."

indicate that the settlement was reached before April 4, 2013. *See* LabCorp's Opening Br. at 10 n.11 (citing CP 14219-22).[44] As such, the secretive terms are pivotal, not only in the impact on the Wuths' credibility,[45] but also to the unforeseeable change of circumstances that caused the Wuths to align with Dr. Harding, at the expense of LabCorp.

The Wuths opted to call their expert, Dr. Robin Clark, to testify during trial. RP 1138. Before her testimony started, the trial court assured the parties that "[t]o the extent she [Dr. Clark] had opinions in her deposition is fair game for all of you." RP 1137. Even though Dr. Clark's deposition included an array of criticisms of Dr. Harding,[46] the Wuths and Dr. Harding alerted LabCorp for the first time moments before she took the stand that Dr. Clark's testimony would *not* include her opinion

---

[44] The agreement expressly acknowledges the possibility that this Court might, at some point in the future, enter an emergency stay pending consideration of a motion for discretionary review filed by Valley on March 22, 2013 (No. 70052-9-I). CP 14219-22. On April 4, 2013, that emergency stay was granted. (No. 70052-9-I, 4/4/13 Order by Comm. Neel). Moreover, the May 28, 2013 ruling from this Court denied Valley's motion for discretionary review and lifted the emergency stay. (No. 70052-9-I, 5/28/2013 Ruling by Dwyer, J.) Any agreement reached after April 4, 2013 would not have had any reason to reference an emergency stay as a contingent possibility.

The Wuths direct this Court to a comment made by the trial judge during post-trial motions, in which she summarized her recollection that LabCorp "never argued to me that there was a mystery about when the settlement agreement was entered into." Resp. Br. at 85 (quoting 1/24/14 RP 56). Even if a trial judge's summary based upon personal recollection more than six weeks after trial ended could be reasonably relied upon as a reliable record of all arguments made during this case, the burden of establishing the terms of settlement, including the date, is on the parties seeking to enforce the agreement, *i.e.*, the Wuths and Dr. Harding. *See Brinkerhoff v. Campbell,* 99 Wn. App. 692, 696-97, 994 P.2d 911 (2000) (explaining that a party moving to enforce a settlement agreement has the burden of proving the existence and material terms of the agreement).

[45] *See* LabCorp's Opening Br. at 38-40.

[46] *See* LabCorp's Opening Br. at 34-36 (citing CP 10233, 10235-36; RP 1140).

criticizing Dr. Harding. RP 1137 ("She won't give that opinion."). To the extent the trial court did exclude her opinions about a perinatologist simply because she was not a perinatologist (as argued by Dr. Harding, RP 1137), doing so was contrary to Washington law, which permits experts to qualify and testify outside of their own narrow specialty and requires a fact-specific examination under ER 702 and 703.[47]

Given the circumstances that resulted in LabCorp not learning of the settlement until the eve of trial (the belated settlement disclosure), the trial court's incorrect reliance on a previous order *in limine* that actually did not address Dr. Clark's qualifications, and the misapplication of criteria properly considered when evaluating whether any given expert is qualified to testify, this Court should conclude that the trial court abused its discretion by refusing to allow LabCorp to elicit Dr. Clark's opinions critical of Dr. Harding during trial.

C. The Trial Court Erred by Instructing the Jury it Could Award Damages Unavailable Under Washington Law

1. General Damages for Wrongful Birth are Impossible to Determine and are Therefore Unavailable

Binding precedent confirms that general damages are not recoverable by Rhea and Brock Wuth because such damages are simply not possible to ascertain. The most recent pronouncement from our

[47] *See supra,* note 24.

Supreme Court regarding the availability of damages for the emotional burden of having an unwanted child was made in *McKernan*, 102 Wn.2d 411,[48] where the Court concluded that the very fact of damage from the birth of an unwanted child could not, as a matter of law, be determined. Because the Court held it was impossible to establish with reasonable certainty whether the birth of a child caused its parents a net loss or a net gain, the Court concluded that emotional distress damages could not be recovered for the birth of the child. *Id.* at 412-13. Therefore, under *McKernan*, damages for Rhea and Brock's emotional burden are undeterminable and, as such, unrecoverable.

2. Deterrence and Punishment Cannot Be Considered Where, as Here, Only Compensatory Damages are Available

The Wuths' theme throughout trial, and a focal point of closing arguments, was that the jury should award damages to the Wuths as a means of deterrence. This theme was severely prejudicial and tainted the jury's understanding of its role in awarding damages. The primary error,

---

[48] Contrary to the Wuths' characterization, *Harbeson* was not "reaffirmed" in *Stewart-Graves v. Vaughn*, 162 Wn.2d 115, 130, ¶28, 176 P.3d 1151 (2007). *Stewart-Graves* merely held that *Harbeson* did not apply where a health care provider breaches a duty after a child is born; it did not address the continued availability of the emotional distress damages that were held impossible to determine and therefore unrecoverable in *McKernan*. Moreover, the *Stewart-Graves* Court expressly identified the parental constitutional interest that provides the foundation for a parent's claim for wrongful birth under *Harbeson*, and the fact that the law recognizes no constitutional interests for a fetus before the point of viability. Through this lens, it is clear that there is no valid basis for recognition of a wrongful life claim for a child who never had a right *not* to be born.

however, lies with the trial judge's[49] rulings that incorrectly told the jury that deterrence damages are a component of compensatory damages.

It is well established that punitive damages are contrary to Washington public policy. *Dailey v. N. Coast Life Ins. Co.*, 129 Wn.2d 572, 575, 919 P.2d 589 (1996). Washington law only permits "compensatory damages [to] fully compensate the plaintiff for all injuries to person or property, tangible or intangible." *Barr v. Interbay Citizens Bank*, 96 Wn.2d 692, 700, 635 P.2d 441 (1981) (*citing Spokane Truck & Dray Co., v. Hoefer*, 2 Wash. 45, 52-53, 25 P. 1072 (1891)). Although as a general matter deterring negligence and compensating for injury are underlying principles of the tort system, *Mohr v. Grantham*, 172 Wn.2d 844, 856, 262 P.3d 490 (2011), there is no case that stands for the proposition that jurors should—or can—be asked to consider deterrence in assessing the amount of compensatory damages. If jurors are asked to do so, then they are being asked to impose punitive damages, which "serve not to compensate the plaintiff but to punish and deter the defendant and others from such conduct in the future." *Dailey*, 129 Wn.2d at 575.

The Wuths cite this Court's recent opinion in *Miller v. Kenny*, 180 Wn. App. 772, 815-17, 325 P.3d 278 (2014), for the proposition that

---

[49] *See* RP 5255 (trial court discussing "the line" it drew to allow the Wuths and Dr. Harding to discuss public policy reasons that underlie the tort system); RP 5388 (same).

"[a]n accurate statement about the policy underlying tort law is not improper argument." Resp. Br. at 52. But *Miller*'s analysis ended with a determination that the issue was not preserved because counsel failed to object.[50] *Miller,* 180 Wn. App. at 816-17. To the extent *Miller* can be read as condoning arguments based upon the policy underlying the applicable law, it is important to note that that case involved insurance bad faith and statutory causes of action that expressly allow treble/punitive damages. *Id.* In this case, LabCorp did object, and, in any event, the curative instruction offered by the trial judge improperly stated the law, as it is undisputed that punitive damages are not available in this case. *See Capers v. Bon Marche, Div. of Allied Stores*, 91 Wn. App. 138, 145, 955 P.2d 822 (1998).

3. Discussions of Deterrence Were Presumptively Prejudicial, and are Reflected in the $50 Million Verdict

"An erroneous jury instruction is presumed to be prejudicial and is grounds for reversal unless it can be shown that the error is harmless." *Ezell v. Hutson*, 105 Wn. App. 485, 492, 20 P.3d 485 (2001) (citation omitted). Here, the jury's $25 million award to Oliver exceeded the Wuths' request for precisely $20,628,306 in economic damages. RP 5287; CP 11721-22. Likewise, the parents' $25 million general damages award

[50] LabCorp's objections in this case are well-documented. *See, e.g., supra*, at II.A.

exceeded any evidence in the record that could support such an award—even if it was not barred by *McKernan*, 102 Wn.2d 411. CP 11721-22.

The Wuths attempt to defend the mirror-image general damage award as customary in injury cases, citing comments made by the trial judge based on her experiences in other cases[51] and a law review article addressing contingency fees. Resp. Br. at 47 n.13. But this case differs from nearly all other general damages cases because this is a unique case for wrongful birth and wrongful life, and because *Harbeson* requires that a damages award consider the parents' mental anguish *and* the emotional benefits to the parents. "In considering damages for emotional injury, the jury should be entitled to consider the countervailing emotional benefits attributable to the birth of the child." *Harbeson*, 98 Wn.2d at 475 (citing Restatement (Second) of Torts §§ 920 (1977) (additional citations omitted)). As the calculations fundamentally differ, generalize notions of customary damages are of no value in assessing the jury's verdict here.

The Wuths have therefore failed to overcome the presumption of prejudice that attached to the trial judge's interjection of deterrence and

[51] The Wuths quote extensively from the trial judge's commentary made during post-trial motions in response to confrontational arguments that errors were made during trial, knowing the verdict was being appealed in an attempt to "backfill" the record. 1/24/13 RP at 71 ("[Y]ou had to be here to see it, like me and like the jury."). The Wuths cite no authority, and LabCorp is aware of none, for the notion that the trial judge's own summary of what she remembered, claims to have seen in terms of love and "implicit" pain, and speculation about the jury's reasons offered in defense of a verdict constitutes "findings" that are appropriately considered on appeal. *See* Resp. Br. at 48-49.

punishment into this compensatory damages case. *See Ezell*, 105 Wn. App. at 492. The jury's record-breaking $50 million verdict is, in itself, a reasonable indication sufficient to support a reasonable inference that the award was skewed by the inflammatory and improper notion that punishment was required in order to deter future conduct. Reversal is required so that a jury can apply compensatory damages principles to the Wuths' damages evidence.

III. CONCLUSION

As set forth in LabCorp's Opening Brief and herein, there are compelling reasons to reverse the $50 million verdict awarded in this case. The jury never got to hear LabCorp's side of the story and was deprived of an opportunity to consider the wrongdoing of Dr. Harding. The result was a liability allocation split evenly between the only other defendants on the verdict form, *i.e.*, LabCorp and Valley. On damages, the jury was encouraged by the trial judge to actively consider deterrence, thereby interjecting punitive damages into this case that involves only compensatory damages. For all of these reasons, LabCorp respectfully urges this Court to reverse and, if necessary, remand for a new trial on liability and damages.

RESPECTFULLY SUBMITTED this 23rd day of February, 2015.

COZEN O'CONNOR

By: _____

Melissa O'Loughlin White, WSBA #27668
mwhite@cozen.com
Megan K. Kirk, WSBA #32893
mkirk@cozen.com
Kevin A. Michael, WSBA #36976
kmichael@cozen.com

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP

Anthony A. Todaro, WSBA #30391
atodaro@corrcronin.com

Attorneys for Appellants
Laboratory Corporation of America,
Dynacare Laboratories, Inc., and Dynacare
Northwest, Inc.

DECLARATION OF SERVICE

The undersigned states:

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

On this 23rd day of February, 2015, I caused to be filed the foregoing Appellant LabCorp's Reply Brief with the Court of Appeals, Division I. I also served a copy of said document on the following parties as indicated below:

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

Counsel for Defendant-Appellant Valley Medical Center: Sherry H. Rogers Craig L. McIvor Melinda R. Drogseth Lee Smart, PS, Inc. 701 Pike Street, Suite 1800 Seattle, WA 98101 shr@leesmart.com clmc@leesmart.com mrd@leesmart.com jlm@leesmart.com and Steven A. Caplow Roger A. Leishman Davis Wright Tremaine LLP 1201 Third Avenue, Suite 2200 Seattle, WA 98101 stevencaplow@dwt.com rogerleishman@dwt.com crystalmoore@dwt.com	[ ] U.S. Mail [X] Email [ ] Legal Messenger [ ] U.S. Mail [X] Email [ ] Legal Messenger

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

Executed at Seattle, Washington, this 23rd day of February, 2015.

Dava Bowzer

APPENDIX A (Exclusion of Dr. London)

SUMMARY JUDGMENT

4/1/13 Dr. Harding filed a Motion for Partial Summary Judgment seeking (1) to dismiss the Wuths' informed consent claim against him, and (2) "to limit the claims against him to the alleged failure to provide Mr. Wuth's genetic test results to LabCorp." CP 2590-2605.

7/1/13 LabCorp opposed Dr. Harding's Motion. CP 2723. LabCorp submitted evidence from Dr. London and from other parties' expert witnesses supporting LabCorp's assertions that Dr. Harding was negligent. CP 2722-39; CP 2743-823 (supporting declaration).

7/1/13 The last day to disclose additional witnesses. CP 14290-91.

7/8/13 Dr. Harding filed a Reply in support of his Motion. The only reference to Dr. London appears on page 11 of the Reply. CP 2914-15.

7/18/13 The trial judge heard argument on Dr. Harding's Motion for Partial Summary Judgment. CP 3131-32. Among other things, the judge struck Dr. London. CP 3141.

RECONSIDERATION

7/26/13 LabCorp filed a Motion for Reconsideration of the Court's July 18, 2013 Order. CP 3142-56; CP 3161-99 (supporting declaration).

9/3/13 Discovery cutoff. CP 14290-91.

10/4/13 Dr. Harding's Opposition to LabCorp Motion for Reconsideration. CP 4746-4823.

10/14/13 The same day the case was transferred to a new judge for trial, the prior judge entered an Order Denying LabCorp's Motion for Reconsideration of 7/18/13 Order. CP 6383-86.

MOTION IN LIMINE

10/14/13 Dr. Harding moved *in limine* to exclude Dr. London at trial. CP 6345-81.

10/18/13 LabCorp opposed Dr. Harding's motion in limine. CP 7493-510.

10/21/13 Trial date. CP 14291.

10/23/13 The trial judge declined to consider Dr. Harding's motion in limine based on her understanding that the prior judge had already ruled on the issue. RP 10/23/13 AM, at 23-24.

10/28/13 A written order on Dr. Harding's motions in limine, including the order excluding Dr. London at trial, was entered. CP 8794-98.

OFFER OF PROOF

12/2/13 The trial judge permitted LabCorp to file an Offer of Proof regarding Dr. London, but refused to read it. CP 10986-89; CP 10991-11000 (supporting declaration); RP 3469.