NO. 95173-0

SUPREME COURT OF THE STATE OF WASHINGTON

L.M., a minor, by and through his Guardian ad litem, WILLIAMS L. E. DUSSAULT,

Appellant,

v.

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

Respondents.

RESPONDENT HAMILTON'S ANSWER TO PETITION FOR REVIEW

Mary H. Spillane, WSBA #11981
FAIN ANDERSON VANDERHOEF
ROSENDAHL O'HALLORAN SPILLANE,
PLLC
701 Fifth Avenue, Suite 4750
Seattle, WA 98104
(206) 749-0094
Attorneys for Respondent Hamilton

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

STATE CASES

FEDERAL CASES

RULES

I. IDENTITY OF RESPONDING PARTY

Respondent Laura Hamilton answers the Petition for Review.

II. COURT OF APPEALS DECISION

Division I, on August 28, 2017, filed an unpublished decision affirming admission of expert medical testimony as to natural forces of labor (NFOL) as a cause of L.M.'s brachial plexus injury (BPI), and Dr. Allan Tencer's testimony as to the biomechanical forces in labor and delivery, and on September 29, 2017, granted Hamilton's motion to publish. The citation is *L.M. v. Hamilton*, 200 Wn. App. 535, 402 P.3d 870 (2017).

III. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals properly affirm the admission of expert medical testimony concerning NFOL as a cause of L.M.'s BPI?

2. Did the Court of Appeals properly affirm the admission of Dr. Tencer's testimony as to the biomechanical forces involved in labor and delivery, but not as to causation of L.M.'s injury?

IV. COUNTERSTATEMENT OF THE CASE

A. L.M.'s Delivery and BPI.

When she became pregnant with L.M., L.M.'s birth mother chose to see Licensed Midwife Laura Hamilton. 10/20 RP (Openings) 5:3-8; 10/23 RP (Hamilton) 54:12-16; Ex. 2, pp. 2, 14. Her pregnancy proceeded uneventfully. Ex. 2, p. 2. Her membranes ruptured ten minutes after she

arrived at Hamilton's clinic in active labor on April 4, 2010, and she delivered L.M. seven minutes after her cervix completely dilated, an incredibly fast second stage of labor.[1] *Id.* at p. 6; 10/26 RP (Browder) 26:9-28:14; *see* 10/21 RP (Mandel) 12:12-14, 40:14-15. L.M.'s grandmother videotaped his birth on a cell phone. 10/29 RP (Closings) 6:22-23; *see* Ex. 1.

Once L.M.'s head was out, Midwife Hamilton reduced a nuchal cord, 10/23 RP (Hamilton) 27:20-28:1, 67:3-13; Ex. 2, pp. 7, 9, and L.M. then turned, rotated himself, and freed his shoulders, and Hamilton assisted him out. 10/23 RP (Hamilton) 27:7-28:1; 10/28 RP (Hamilton) 10:1-25. Right arm weakness was noted. 10/23 RP (Hamilton) 52:3-24: Ex. 2, pp. 7-9. L.M.'s right arm function did not improve, surgery revealed a rupture or avulsion of all five brachial plexus nerve roots, and his right arm use remains limited. 10/22 RP (Glass) 26:21-27:1, 33:7-11, 39:23-40:25.

B. The Parties' Theories, the Jury's Verdict, and the Appeal.

L.M., through his guardian, sued Midwife Hamilton. CP 1453-58. His theory, supported by experts Nurse Midwife Kelly, obstetrician Dr. Mandel, and child neurologist, Dr. Glass, was that Hamilton faced a shoulder dystocia and applied excessive lateral traction to L.M.'s head and neck to free the shoulder, causing the BPI.[2] Midwife Hamilton's theory, sup-

[1] A quick second stage has a higher incidence of BPIs. 10/28 RP (DeMott) 16:15-17:4.
[2] *See* 10/20 RP (Kelly) 44:24-46:5, 69:7-16; 10/21 RP (Mandel) 11:3-13, 50:24-52:5, 66:22-25, 111:6-11, 125:18-22; 10/22:RP (Glass) 86:4-87:3, 110:21-111:10.

ported by experts Licensed Midwife Browder, obstetrician Dr. DeMott, and child neurologist Dr. Collins, was that this was a normal birth with gentle handling of the baby to assist delivery, and that L.M.'s BPI was caused by NFOL, not anything Hamilton did.[3] Both sides' medical experts based their opinions on review of L.M.'s birth video and medical records,[4] interpretation of the literature,[5] and knowledge and experience.

While L.M.'s experts claimed the birth video showed a shoulder dystocia with Midwife Hamilton using excessive traction to relieve it,[6] the defense experts disagreed, finding the birth video showed proper handling of the baby, no shoulder dystocia, and no excessive traction.[7] And while L.M.'s experts claimed the medical literature did not support a conclusion that NFOL could cause a rupture or avulsion of the brachial plexus nerve roots like L.M. had and that such an injury must have occurred as a result

---

[3] *See* 10/28 RP (DeMott) 45:18-21, 47:15-22, 52:10-53:13, 54:4-25, 55: 4-6, 72:4-73:4, 74:21-23, 81:9-15, 84:14-20, 89:6, 91:5-11, 93:5-16, 100:9-20; 10/26 RP (Browder) 31:3-33:16, 34:2-35:3, 35:4-6, 48:3-8, 50:24-51:1, 70:2-5, 79:17-80:11, 83:2-7, 83:12-84:2.

[4] *See* 10/20 RP (Kelly) 18:11-21; 10/21 RP (Mandel) 11:14-23; 10/22 RP (Glass) 14:22-25, 18:9-11; 10/26 RP (Browder) 30:21-31:4; 10/28 RP (DeMott) 37:8-17; CP 4966, 4971-73, 4986-87 (Collins Dep.).

[5] *See* 10/20 RP (Kelly) 75:1-11, 82:19-83:6; 10/21 RP (Mandel) 67:5-6, 19-21, 68:5-8, 69:2-5, 90:20-91:5, 91:6-92:9, 112:13-113:17, 113:25-114:3; 114:4-115:11, 117:7-21, 118:7-22; 10/22 RP (Glass) 86:7-89:18; 10/26 RP (Browder) 30:25-31:2; 10/28 RP (DeMott) 8:9-10, 8:19-9:10, 10:13-19:1, 20:12-21:9, 27:18-28:10, 28:23-29:25, 68:15-23, 95:2-14; CP 4969-73, 4982 (Collins Dep.)

[6] *See* 10/20 RP (Kelly) 38:12-39:14, 40:24-41:6, 44:17-19, 57:19-23; 10/21 RP (Mandel) 11:3-13, 21:5-22:19, 25:18-20, 45:2-11, 46:13-47:3, 47:21-24, 48:16-49:2, 70:3-5.

[7] *See* 10/28 RP (DeMott) 45:18-21, 47:15-22, 52:10-53:13, 72:4-73:4, 74:21-23, 84:14-20, 89:6, 91:5-11, 100:9-20; 10/26 RP (Browder) 31:3-33:16, 35:4-6, 48:3-8, 50:24-51:1, 70:2-5, 79:17-80:11, 83:2-7, 83:12-84:2. Dr. Collins, not an obstetrician or midwife, was the only defense expert who thought there was a shoulder dystocia during L.M.'s delivery. *See* CP 4972 (Collins Dep.)

of excessive lateral traction,[8] the defense experts disagreed. The defense experts cited ample medical literature establishing that permanent BPIs (which include rupture and avulsion injuries) can and do occur from NFOL without intervention by the birth attendant[9] and opined, more probably than not, that is what occurred in L.M.'s case as the birth video shows proper handling of the baby and no excessive traction.[10]

The jury found no negligence, CP 3822-23, judgment was entered on the verdict, CP 3824-25, and L.M's new trial motion was denied, CP 4750-51. L.M. appealed, CP 4752-4817, claiming, *inter alia*, trial court error in allowing NFOL causation evidence and in allowing Dr. Tencer to testify as to the endogenous and exogenous forces of labor and delivery. Division I affirmed and L.M. has petitioned for review.

C. The Motions About Admissibility of NFOL Causation Evidence and Dr. Tencer's Testimony as to Biomechanical Forces.

Two months before trial, L.M. moved under ER 702, ER 403, and

---

[8] *See* 10/21 RP (Mandel) 69:2-5, 112:13-113:17, 118:19-22; 10/22 RP (Glass) 86:22-24, 89:10-13, 108:14-18, 115:8-10; *see also* 10/20 RP (Kelly) 82:19-83:6.

[9] Even L.M.'s experts admitted that NFOL can cause fractured clavicles, fractured tail-bones, as well as some BPIs, 10/21 RP (Mandel) 88:2-25, 89:1-12; 10/22 RP (Glass) 87:8-13, 89:4-5, 104:23-25, 119:4-7; acknowledged case reports of permanent BPIs occurring without shoulder dystocia, with C-sections, and in cases where the birth attendant was not touching the patient, 10/21 RP (Mandel) 87:17-19, 119:3-21; 10/22 RP (Glass) 13:18-19, 115:11-25; and admitted the absence of literature stating that only traction, as opposed to NFOL, can cause permanent avulsion or rupture BPIs. 10/21 RP (Mandel) 90:20-91:5; 10/22 RP (Glass) 120:10-15. Dr. Mandel also acknowledged that the literature references to permanent (or persistent) BPIs caused by NFOL includes avulsions, ruptures, and bad stretch injuries. 10/21 RP (Mandel) 117:7-21, 118:7-11.

[10] *See* 10/28 RP (DeMott) 11:11-21:9, 27:18-19:2, 28:23-29:15, 68:15-69:5, 84:4-11, 94:12-95:1; CP 4981-82, 4985-86 (Collins Dep.).

Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), to exclude evidence of NFOL causation, claiming that, absent medical literature specifically stating that NFOL can cause rupture or avulsion BPIs like L.M.'s (as opposed to permanent BPIs), such testimony was speculative, unreliable, misleading, more prejudicial than probative, and not generally accepted in the relevant medical community. CP 1459-1599; *see also* CP 2045-2119. L.M. relied upon two New York cases[11] rejecting similar evidence, *see* CP 1475-78, and declarations of Midwife Kelly, CP 1554-64, Dr. Glass, CP 1565-83, and Dr. Mandel, CP 1584-99, opining that L.M.'s avulsion or rupture of all five brachial plexus nerve roots was more likely than not caused by Midwife Hamilton applying excessive traction, that that is the only way his injury could have occurred, and that it is improbable, if not impossible, for it to have been caused by NFOL, CP 1557 at ¶9 (Kelly), 1573 at ¶9 (Glass), 1587-88 at ¶9, 1590 at ¶14 (Mandel).[12] L.M.'s experts cited the absence of any literature stating that NFOL can cause avulsion or rupture BPIs. CP 1557 at ¶9:18-21 (Kelly), 1573 at ¶9:1-10 (Glass), 1590 at ¶14:13-14 (Mandel); *see also* CP 1588 at ¶9:3-5 (Mandel).

Midwife Hamilton opposed the motion, arguing that her experts'

---

[11] *Muhammed v. Fitzpatrick*, 91 A.D.3d 1353, 937 N.Y.S. 2d 519 (N.Y. App. Div. 2012); *Nobre v. Shanahan*, 42 Misc. 3d 909, 976 N.Y.S.2d 841 (N.Y. Sup. Ct. 2013).

[12] Dr. Mandel, CP 1587-88 at ¶9, disagreed with the opinions of defense expert Dr. Elizabeth Sanford, who was the only defense expert L.M. chose to depose. *See* CP 1777. L.M.'s counsel attached a declaration and excerpts of the deposition of Dr. Sanford, CP 1525-27, 1528-36, to his declaration in support of the motion to exclude, CP 1503-53.

NFOL causation opinions did not implicate *Frye*, met ER 702's requirements, were relevant to the issues, would be helpful to the jury, and were based on generally accepted scientific methodologies and techniques published in the medical literature over the last 25 years and affirmed by the 2014 ACOG Report on "Neonatal Brachial Plexus Palsy." CP 1736-60; *see* CP 1867-1987. She submitted a declaration from Dr. DeMott, CP 1838-2041, who attached pertinent medical literature, *see* CP 1848-2041, and explained (as he did at trial, *see* 10/28 RP (DeMott) 11:11-21:9) how the scientific understanding of the etiology of BPIs has evolved over the past 15 to 25 years, CP 1839-42 at ¶¶12-20; that the medical literature does describe permanent BPI occurring as a result of maternal forces of labor, CP 1839 at ¶15, 1842 at ¶20, 1843-47 at ¶¶23-31; that peer-reviewed medical literature does not support claims that permanent BPIs cannot be caused by maternal forces or are evidence of provider negligence, CP 1842 at ¶19; that Dr. Mandel's focus on lack of literature specific to rupture or avulsion BPIs misrepresents current science, as the literature focuses on the injury's permanent nature and associated etiologies, not subcategories of permanent injuries, CP 1842-43 at ¶22; and that no scientific data suggests that NFOL alone cannot cause rupture or avulsion permanent BPIs, CP 1842-43 at ¶22; *see also* CP 1839 at ¶14.[13]

[13] Midwife Hamilton also submitted additional excerpts of Dr. Sanford's deposition, CP

The trial court granted L.M.'s motion, concluding that (1) under ER 702, the defense evidence was not specific enough to establish that NFOL can cause the specific type of injury L.M. had; (2) under *Frye*, the defense had not established that there was consensus in the scientific community that NFOL could cause such an injury; and (3) the defense experts' testimony was insufficient to "specifically tie the injury here in this case to [NFOL]." 9/18 RP (Motion Hearing) 18-20. It so ruled even though it recognized that the defense expert testimony was akin to a differential diagnosis such that, if (as the defense experts said) no excessive traction was applied, then the only thing that could have caused L.M.'s injury was NFOL, and that one could not "go yank on a baby's head" and test how much force is enough to cause a brachial plexus avulsion. *Id.* at 19-20.

Based on the exclusion of NFOL causation evidence, L.M. then moved for partial summary judgment on negligence and causation. CP 1621-36. Midwife Hamilton opposed that motion, CP 2628-2919, and moved for reconsideration of the trial court's exclusion of NFOL causation evidence, CP 2920-3095, submitting additional declarations of her experts, CP 2658-61, 2651-57, 2662-66, 2667-72, 2673-80, 2681-2870, and pointing out that (1) her experts were qualified; (2) their testimony

---

1789-91, in which she testified that, based on the medical literature, she could opine as to whether in-utero forces can cause a nerve avulsion injury, and opined that L.M.'s injury was not related to the delivery, but occurred from NFOL before his delivery, as she saw nothing unusual in the delivery process on the birth video. CP 1791.

was not novel scientific evidence; (3) their methodology was the same methodology L.M.'s experts used and was generally accepted in the medical community; (4) *Frye* requires only the methodology, not the conclusions drawn therefrom, be generally accepted; (5) a majority of other courts have held NFOL causation testimony admissible; and (7) the testimony would assist the jury in understanding the birth process, the natural forces involved, and the complexities of the two competing causation theories – excessive traction versus NFOL.

L.M. argued that none of the CR 59(a) grounds for reconsideration were met, and reiterated his previous submissions. *See* CP 3212-29.

Meanwhile, in response to the trial court's request for more information, 9/18 RP (Motion Hearing) 26:2-12, CP 2358, Midwife Hamilton also moved to allow Dr. Tencer to testify as to the biomechanical endogenous and exogenous forces of labor, CP 2358-2608; *see also* CP 3231-38. She made clear that Dr. Tencer would not be offering "medical" opinions, CP 2360, and Dr. Tencer made clear that "[f]rom a biomechanical forces perspective, it is not possible to differentiate whether the brachial plexus nerve damage suffered by [L.M.] resulted from exogenous, endogenous or some combination of both forces," CP 2376, ¶5(i).

L.M. also opposed that motion, claiming Dr. Tencer's testimony was speculative, misleading, and went to the heart of the excluded NFOL

causation defense, and disagreeing with conclusions Dr. Tencer drew from biomechanical studies on infant BPIs. CP 3175-3204.

After argument, the trial court granted the motion for reconsideration to allow the defense to present evidence regarding NFOL causation. 10/12 RP (Motion Hearing) 26-30; CP 3246-48. The court noted that, in previously ruling there was no evidence specifically dealing with NFOL causing avulsion BPIs, it had gotten it wrong, as experts' ultimate opinions are not what must be generally accepted, just the methodology on which the opinions are based, and that it would be unfair to limit the defense to testimony that Midwife Hamilton did not violate the standard of care or apply traction, but then leave it unable to explain how the injury could have happened without traction. *Id.* at 26-27.

The court reasoned that the issue went to weight, not admissibility, that peer-reviewed and published literature favored admissibility, and that, while the ACOG report does not speak specifically about avulsions, it does speak about permanent injuries, which means some disruption of the nerve, and that is enough for the evidence to go to the jury. *Id.* at 27-28. The court also found persuasive the logic of cases from other jurisdictions that favor admissibility, particularly that of *Taber v. Roush*, 316 S.W.3d 139 (Tex. App. 2010), as to why the use of retrospective rather than prospective studies was excused by ethical considerations – one could not

ethically go and determine how much pressure it takes to cause a rupture or avulsion – and why, in the absence of such testing it is appropriate to look at peer-reviewed and published literature. 10/12 RP (Motion Hearing) 28-29. The court no longer found the defense experts' conclusion novel, but based on reliable principles and methods and that, while there is no literature specifically attributing permanent avulsion injuries to NFOL, there is also no literature stating that such injuries can occur only from excessive lateral traction. *Id.* at 29-30.

The trial court also granted the motion to allow Dr. Tencer's testimony. *Id.* at 37-38; CP 3244-45. Although the court had excluded Dr. Tencer's testimony in an automobile accident case, the court found he was qualified to testify in this case and that his testimony would be helpful to the jury to understand the forces at play. 10/12 RP (Motion Hearing) at 37. The court noted that, if Dr. Tencer crossed the line into medical causation, it would sustain an expected immediate objection. *Id.* at 37-38.

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

L.M. asserts that the Court of Appeals' decision as to NFOL causation evidence is in conflict with this Court's prior decisions on admission of scientific evidence and is in conflict with prior decisions of this Court and the Court of Appeals regarding admissibility of testimony by Dr. Tencer. Because the Court of Appeals' decision is not in conflict with

decisions of this Court or the Court of Appeals, L.M.'s petition for review should be denied. Also, L.M's request for remand for some form of *Frye* hearing L.M. never asked the trial court to conduct should be rejected.

A. L.M. Is Not Entitled to Reversal and Remand for a *Frye* Hearing that He Never Asked the Trial Court to Conduct.

L.M. asserts, *Pet. at 1, 7-8, 11, 13*, this Court should accept review, reverse, and remand for the trial court to conduct a *Frye* hearing concerning NFOL causation testimony. L.M., however, ignores that he never asked the trial court to conduct any *Frye* hearing other than what it conducted based on review of the briefs, declarations, literature, and other jurisdiction cases the parties submitted on the motions to exclude and for reconsideration. Nor has he shown what he would present at another *Frye* hearing that he did not or could not present on those motions, or how he is prejudiced by not having a form of *Frye* hearing he never requested.

In his motion to exclude evidence of NFOL causation, L.M. argued that "No *Frye* hearing is necessary for this determination." CP 1460. In reply, he chastised Hamilton for not requesting a *Frye* hearing, CP 2045, but did not suggest that the court needed to do anything other than review the submissions and rule on the motion to exclude. Even in response to the reconsideration motion, he did not request, but instead argued that Hamilton never requested, a *Frye* hearing. CP 3213. Failure to request a

Frye hearing in the trial court constitutes a waiver of the issue on appeal. *State v. Lizarraga*, 191 Wn. App. 530, 567 n.21, 364 P.3d 810 (2015).

B. The Court of Appeals' Affirmance of Admission of NFOL Causation Evidence is Not in Conflict with Any Decision of this Court.

Although L.M. asserts, *Pet. at 6*, that the Court of Appeals' affirmance of the admission of the NFOL causation evidence is in conflict with decisions of this Court concerning admission of scientific evidence, he never explains how the Court of Appeals' decision conflicts with any decision of this Court that he cites, *Pet. at 6-7 – Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 918, 296 P.3d 860 (2013); *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 603, 260 P. 3d 857 (2011); *State v. Gregory*, 158 Wn.2d 759, 829, 147 P.3d 1201 (2006); *State v. Cauthron*, 120 Wn.2d 879, 887, 846 P.2d 502 (1993). In fact, in reaching its decision as to the admissibility of NFOL causation evidence, the Court of Appeals cited and relied upon *Lakey* (which cited *Cauthron*) and *Anderson* (which cited both *Gregory* and *Cauthron*).

As the Court of Appeals correctly noted, quoting from *Lakey*, 176 Wn.2d at 919, and *Anderson*, 172 Wn.2d at 611: "*Frye* ... is implicated only where 'either the theory and technique or method of arriving at the data relied upon is so novel that it is not generally accepted by the relevant scientific community.'" *L.M.*, 200 Wn. App. at 539, 540-41. "If the theory

or method has general scientific consensus, its application to reach novel conclusions as to causation does not implicate *Frye*." *Id.* at 541 (citing *Lakey*, 176 Wn.2d at 920).

> "*Frye* does not require that the specific conclusions drawn from the scientific data upon which [an expert] relied be generally accepted in the scientific community. *Frye* does not require every deduction drawn from generally accepted theories to be generally accepted."

L.M., 200 Wn. App. at 541 (quoting *Anderson*, 172Wn.2d at 611).[14]

Here, there was nothing novel about the scientific methodology the defense medical experts used to arrive at their causation opinions. It was the same methodology L.M.'s medical experts used – review of L.M.'s medical records and birth video, interpretation of pertinent medical literature, and reliance on knowledge, training and experience. That L.M.'s experts drew different conclusions from the same medical records, birth video, and peer-reviewed medical literature (undisputedly showing that NFOL may cause permanent BPIs, even if it does not identify whether those permanent BPIs were due to stretch, rupture or avulsion) does not make either side's medical experts' scientific methodology novel or their conclusions less worthy of the jury's consideration.

L.M.'s selective quotes from the literature, *Pet. at 7-11*, as to the

---

[14] Many medical opinions are based on "differential diagnoses." *Anderson*, 172 Wn.2d at 610. A "physician or other qualified expert may base a conclusion about causation through a process of ruling out potential causes with due consideration to temporal factors, such as events and the onset of symptoms." *Id.* at 610.

uncertainty as to exactly what happens to cause permanent BPIs or the degree of force needed to cause a permanent rupture or avulsion BPI, and L.M.'s insistence about the absence of any specific report in the literature of an avulsion BPI due to NFOL are beside the point. The *Frye* consideration is whether the methodology the experts used to arrive at their conclusion, not whether the conclusion they drew, is generally accepted in the scientific community. As L.M.'s own experts conceded, there is no literature establishing that avulsion BPIs cannot be caused by NFOL. And, as Dr. Mandel conceded, references in the literature to permanent BPIs resulting from NFOL include avulsions, ruptures and severe stretch injuries. *See* fn. 9, *supra*. As Dr. Collins testified, the fact that a BPI is permanent means that the nerve has ruptured or avulsed. CP 4981. And, as Dr. DeMott testified, no one has ever demonstrated that more force is required to cause a rupture or avulsion than to cause an intact stretch BPI, nor have any studies been done comparing the force during delivery with the specific subcategories of permanent BPIs. 10/28 RP (DeMott) 27:18-28:2, 67:22-68:23, 94:12-95:1; CP 1842, ¶22, 1848, ¶33.

As this Court made clear in *Anderson*, 176 Wn.2d at 611: "*Frye* does not require every deduction drawn from generally accepted theories to be generally accepted." If "'general acceptance' of each discrete and ever more specific part of an expert opinion" were required, then "virtual-

ly all opinions based upon scientific data could be argued to be within some part of the scientific twilight zone." *Id.* at 611. The Court of Appeals' determinations that L.M.'s complaints about NFOL causation evidence goes to weight, not admissibility, and that the trial court properly found *Frye* did not require its exclusion does not conflict, but is consistent, with this Court's decisions concerning admissibility of scientific evidence.

C. The Court of Appeals' Decision as to Dr. Tencer's Testimony Is Not in Conflict with Any Washington Appellate Court Decisions.

L.M. asserts, *Pet. at 14*, the Court of Appeals' affirmance of the admission of Dr. Tencer's testimony "conflicts with prior opinions of this Court and the Court of Appeals regarding admission of medical causation testimony." That assertion, however, ignores defense counsel's representation and the trial court's ruling that Dr. Tencer would not be testifying to the cause of L.M.'s injury, CP 2360; Dr. Tencer's declaration testimony, that "[f]rom a biomechanical forces perspective, it is not possible to differentiate" whether L.M.'s injury "resulted from exogenous, endogenous or some combination of both forces," CP 2376, ¶5(i); and the fact that, at trial, Dr. Tencer was not asked about and did not offer any opinion as to the specific forces involved in L.M.'s delivery or the cause of L.M's injury, *see* 10/27 RP (Tencer) 26:4-6. Indeed, L.M. has not cited any place in the trial transcript where Dr. Tencer gave a medical causation opinion,

much less testified, as L.M. suggests, *Pet. at 14-15*, that L.M. could not have been injured by traction on his head and neck.[15]

L.M. also asserts, *Pet. at 14*, the Court of Appeals' decision as to Dr. Tencer's testimony conflicts with Washington decisions regarding admissibility of expert testimony under ER 702, but again fails to establish any such conflict. As those decisions make clear, admissibility under ER 702 is a two-step inquiry – "whether the witness qualifies as an expert and whether the expert testimony would be helpful to the trier of fact," *Reese v. Stroh*, 128 Wn. 2d 300, 306, 907 P.2d 282 (1995), and the trial court has "wide discretion in ruling on the admissibility of expert testimony," *Miller v. Likins*, 109 Wn. App. 140, 147, 34 P.3d 835 (2001).

Contrary to L.M.'s assertions, *Pet. at 14*, the mere fact that one appellate court in *Ma'Ele v. Arrington*, 111 Wn. App. 557, 45 P.3d 557 (2002), affirmed the admission, and another in *Stedman v. Cooper*, 172 Wn. App. 9, 292 P.3d 764 (2012), affirmed the exclusion, of Dr. Tencer's testimony as to the sufficiency of the biomechanical forces at play in a motor vehicle accident to cause injury, does not render those decisions in conflict with each other or the decision in this case in conflict with either of them. As the court explained in *Stedman*, 172 Wn. App. at 18:

> The fact that an appellate court has affirmed a decision

[15] Because Dr. Tencer did not give expert medical testimony, he did not, as L.M. suggests, *Pet. at 16*, need a medical degree to give the testimony he gave.

> allowing Tencer's testimony does not, of course, necessarily mean that the trial court erred by excluding his testimony in this case. The broad standard of abuse of discretion means that courts can reasonably reach different conclusions about whether, and to what extent, an expert's testimony will be helpful to the jury in a particular case.

And, as this Court further explained in *Johnston-Forbes v. Matsunaga*, 181 Wn. 2d 346, 354, 333 P.3d 388 (2014), the *Stedman* court's statement

> appears consistent with the approach ER 702 through 705 contemplate. That is, in each case a trial court's decision is guided by the requirements of the rules in balancing the factors to determine whether such testimony should be admissible in the context of the specific facts in each case.

L.M. suggests, *Pet. at 16*, that because Dr. Tencer's training and experience is in orthopedics, not the mechanics of childbirth, because he testifies about automobile collisions, or because he is not qualified to treat patients, he was not qualified to testify about the biomechanical forces in labor and delivery. But, as the Court of Appeals correctly observed, *L.M.*, 200 Wn. App. at 557: "Dr. Tencer has extensive training and experience in medical settings with injuries to the spinal cord and nerve roots, as well as the force levels necessary to cause them." Indeed, he has done biomechanical research studying the strength of the spinal cord and nerve roots, and has reviewed the published research of other biomechanical engineers who have studied the forces of labor and delivery. CP 2372-73; 10/27 RP (Tencer) 5:16-7:14, 9:17-20, 10:22-11:19. Moreover, an expert need not acquire his knowledge through personal experience, but may testify based

on his training, experience, professional observations, and acquired knowledge. *E.g.*, *Reese*, 128 Wn.2d at 307-08; *State v. Rodriquez*, 163 Wn. App. 215, 232, 259 P.3d 1145 (2011).

L.M.'s claims, *Pet. at 17-19*, that Dr. Tencer's opinions lacked reliability and thus were not helpful to the jury are without merit. First, L.M.'s assertion, *Pet. at 17-18*, that Dr. Tencer's opinion that "most clinicians used less than 150 N" of force in delivering a baby, was unreliable and could mislead the jury ignores that that was a conclusion reached in the published literature, *see* CP 1912, and, while something Dr. Tencer stated in his declaration, CP 2375, was not an opinion he expressed at trial, *see* 10/27 RP (Tencer) 4-39.[16]

Second, L.M.'s selective quotes from the medical literature (only two of which were used in cross-examining Dr. Tencer) does not render unreliable the testimony Dr. Tencer gave. From the published studies done to measure the forces in labor and delivery, Dr. Tencer testified that the internal forces trying to push the baby out range from about 28 to 37 pounds, and the external forces from the birth attendants guiding or pulling the baby out range from 1.6 pounds up to 57 pounds, such that on

[16] L.M.'s claim, *Pet. at 17*, that "[n]othing in the evidence suggests that Hamilton did not use more force than average," ignores the defense experts' testimony that the birth video showed normal handling and no use of excessive force. And, L.M.'s claim, *Pet. at 18*, that Tencer's testimony could mislead the jury that less than 150 N was applied in this case is belied by the fact that Tencer gave no testimony at trial about "150 N" or the amount of force applied in this case.

average they are about the same. 10/27 RP (Tencer) 9:17-16:3, 31:13-25. As for the compression and tension forces on the brachial plexus when a baby's shoulder comes up against a solid obstruction such as the mother's pelvis, he pointed out that studies have shown that the compression forces are four-to-nine times greater than the tension forces, and that nerves can withstand more tension (a stretch of as much as 30%) than compression. *Id.* at 16:15-19:5. Based on his work with bones and nerves, he testified that nerves are much weaker than bones, *id.* at 19:18-20:1, 24:19-25:24; *see also* CP 2373, ¶2:10-14, and that, if NFOL could cause clavicle fractures,[17] then the NFOL are very high. 10/27 RP (Tencer) 20:11-19. He then opined that it "certainly appears" that NFOL can cause rupture or avulsion of the brachial plexus. *Id.* at 22:6-9. L.M.'s selective quotes from the literature do not establish lack of foundation for Dr. Tencer's opinions,[18] but at most, as the trial court observed, 10/12 RP 37:21-22, provide "excellent arguments for cross-examination."

Finally, L.M. asserts, *Pet. at 16*, that "Tencer did not apply what

---

[17] Even L.M.'s expert, Dr. Mandel has had a clavicle fracture occur solely from NFOL. 10/21 RP (Mandel) 88:2-25.

[18] L.M.'s complaint, *Pet. at 19*, that Dr. Tencer somehow evaded a question on cross as to whether he would agree with a 1999 article's statement that "there are no data to quantify the threshold pressures needed to induce traction versus compression related nerve injury," stating that "science moves forward" and "there's probably more data around," but presenting no evidence of newer studies, ignores that (1) L.M.'s counsel did not follow-up and ask him to cite any newer studies, *see* 10/27 RP (Tencer) 28: 18-29:11, (2) L.M.'s counsel agreed that "there is more data and articles," *id.* at 29:5; and (3) Dr. Tencer agreed that a later published statement that "[a]n estimated of the force needed to cause nerve rupture cannot be directly established" was "fair," *id.* at 29:25-30:2.

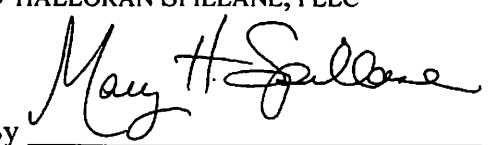
little science that exists to the facts of this case," because he did not know the internal forces at play or the force Hamilton used during L.M.'s delivery, as if that somehow rendered his testimony inadmissible. Besides admitting that some science concerning the forces involved in labor and delivery exists, L.M.'s assertion ignores that "an expert's testimony 'not based on a personal evaluation of the subject goes to the testimony's weight, not its admissibility.'" *Johnston-Forbes*, 181 Wn.2d at 357. Dr. Tencer was not called to testify about the actual forces involved in L.M.'s labor and delivery; he was asked to describe the endogenous and exogenous forces generally at play and the relative strength of bones versus nerves. Because he was qualified to give such testimony and it would be helpful to the jury's understanding of those forces, the Court of Appeals properly found no abuse of discretion in allowing his testimony under ER 702. That decision is not conflict with any Washington appellate decision.

VI. CONCLUSION

For all these reasons, the Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 28th day of November 2017.

FAIN ANDERSON VANDERHOEF ROSENDAHL
O'HALLORAN SPILLANE, PLLC

By 

Mary H. Spillane, WSBA #11981
Attorneys for Respondent Hamilton

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 28th day of November, 2017, I caused a true and correct copy of the foregoing document, "Respondent Hamilton's Answer to Petition for Review," to be delivered in the manner indicated below to the following counsel of record:

Counsel for Appellants:
Ron Perey, WSBA #02275
PEREY LAW GROUP
1631 15th Ave. W., Suite 310
Seattle WA 98119
Ph: (206) 443-7600
Email: ronperey@pereylaw.com

SENT VIA:
☐ Fax
☐ ABC Legal Services
☐ Express Mail
☐ Regular U.S. Mail
☑ E-file / E-mail

Counsel for Appellants:
Carla Tachau Lawrence, WSBA #14120
CARLA TACHAU LAWRENCE LEGAL RESEARCH &WRITING
10700 Meridian Ave N Ste 215
Seattle WA 98133-9008
Ph: (206) 795-9062
Email: carla@ct-lawrence.com

SENT VIA:
☐ Fax
☐ ABC Legal Services
☐ Express Mail
☐ Regular U.S. Mail
☑ E-file / E-mail

Counsel for Appellants:
Simeon Osborn, WSBA #14484
Susan Machler, WSBA #23256
OSBORN MACHLER
2025 1st Ave., Suite 1200
Seattle WA 98121-2510
Ph: (206) 441-4110
Email: sosborn@osbornmachler.com
smachler@osbornmachler.com

SENT VIA:
☐ Fax
☐ ABC Legal Services
☐ Express Mail
☐ Regular U.S. Mail
☑ E-file / E-mail

Co-counsel for Respondents Laura Hamilton and Laura Hamilton Licensed Midwife:
Donna M. Moniz, WSBA #12762
Karin J. Mitchell, WSBA #44101
JOHNSON GRAFFE KEAY MONIZ & WICK, PLLC
925 Fourth Avenue, Suite 2300
Seattle, WA 98104
Ph: (206) 223-4770
Fx: (206) 386-7344
Email: donna@jgkmw.com
mitchellk@jgkmw.com

SENT VIA:
☐ Fax
☐ ABC Legal Services
☐ Express Mail
☐ Regular U.S. Mail
☑ E-file / E-mail

Counsel for Defendants/Respondents Joint Underwriters Association of WA State and Midwifery Support Services, LLC:
Karen S. Weaver, WSBA #11979
SOHA & LANG PS
1325 4th Ave Suite 2000
Seattle WA 98101-2570
Ph: 206.624-1800
Email: weaver@sohalang.com

SENT VIA:
☐ Fax
☐ ABC Legal Services
☐ Express Mail
☐ Regular U.S. Mail
☑ E-file / E-mail

DATED this 28th day of November, 2017, at Seattle, Washington.

Carrie A. Custer

Carrie A. Custer, Legal Assistant

FAVROS LAW

November 28, 2017 - 2:32 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	95173-0
Appellate Court Case Title:	L.M. v. Laura Hamilton, et al.
Superior Court Case Number:	14-2-01043-3

The following documents have been uploaded:

- 951730_Answer_Reply_20171128142642SC606794_9088.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was Answer to Petition for Review.pdf

A copy of the uploaded files will be sent to:

- carla@ct-lawrence.com
- donna@jgkmw.com
- mitchellk@jgkmw.com
- ronperey@me.com
- smachler@osbornmachler.com
- sosborn@osbornmachler.com
- weaver@sohalang.com

Comments:

Sender Name: Carrie Custer - Email: carrie@favros.com
Filing on Behalf of: Mary H. Spillane - Email: mary@FAVROS.com (Alternate Email: carrie@favros.com)

Address:
701 Fifth Ave
Suite 4750
SEATTLE, WA, 98104
Phone: (206) 749-0094

Note: The Filing Id is 20171128142642SC606794