

No. 71497-0

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

Respondents,

v.

LABORATORY CORPORATION OF AMERICA, a foreign
corporation; DYNACARE LABORATORIES, INC., a foreign
corporation; DYNACARE NORTHWEST, INC., a domestic
corporation, d/b/a DYNACARE LABORATORIES, INC., a domestic
corporation; KING COUNTY PUBLIC HOSPITAL DISTRICT NO. 1,
d/b/a VALLEY MEDICAL CENTER,

Appellants.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE CATHERINE SHAFFER

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BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	RESTATEMENT OF THE CASE	2
A.	Restatement of Facts.	2
1.	After genetic testing revealed that an inherited chromosomal abnormality caused his cousin's severe birth defects, Brock Wuth learned he was a carrier of the same defect.	3
2.	Rhea Wuth's obstetrician referred the Wuths to Valley's Maternal-Fetal Medicine Center for genetic testing and counseling when Rhea was 12 weeks pregnant in December 2007.	5
3.	Valley and its employees and agents were negligent in scheduling and obtaining the Wuths' genetic testing.....	8
a.	Valley cut its genetic counseling to a single day each week, which was inadequate to serve patients in its increasingly profitable Maternal-Fetal Medicine Clinic.	9
b.	Valley, in violation of its own guidelines and the standard of care, scheduled Rhea's procedure on a day when no genetic counselor was present.	11
c.	Valley's medical assistant did not follow Dr. Harding's instruction to send Brock's genetic report with the fetal tissue sample so LabCorp could determine whether the fetus had the chromosomal abnormality.	13

4.	LabCorp, knowing that Valley had ordered genetic testing for a family history of chromosomal abnormality, failed to take the most basic steps to determine the location of the genetic defect.....	17
5.	Valley’s part-time genetic counselor reported the “normal” test results to the Wuths and their physicians without determining that LabCorp had failed to look for the very abnormality for which the Wuths had sought genetic testing.	22
6.	Oliver faces a lifetime of extraordinary medical expenses and his parents face a lifetime of anxiety and distress.	24
B.	Procedural history.	26
III.	ARGUMENT	32
A.	The trial court properly adhered to <i>Harbeson</i> in authorizing the Wuths’ claim for medical negligence, in seating a jury that would follow the court’s instructions, and in its discretionary evidentiary rulings.	32
1.	<i>Harbeson</i> requires health care providers and laboratories to competently perform genetic testing and respects the right to reproductive choice. (Valley Arg. § B; LabCorp Arg. § B)	32
2.	Valley and LabCorp consented to the trial court’s voir dire process and never objected to removal of jurors who would not agree to follow the court’s instructions. (Valley Arg. § C.2)	36

3.	The jury fulfilled its constitutional role by awarding damages consistent with established law and supported by substantial evidence. (Valley Arg. § B.1)	40
a.	The trial court properly refused to remit the jury’s reasoned and reasonable award of damages to compensate Oliver for a lifetime of medical expenses. (Valley Arg. § B.3).....	41
b.	This Court cannot substitute its judgment for the jury’s award of emotional distress damages expressly authorized by <i>Harbeson</i> . (Valley Arg. § B.2; LabCorp Arg. § B.1)	45
4.	Evidence concerning Brock’s cousin’s condition was relevant to both proximate cause and damages. (Valley Arg. § C.3)	49
5.	The trial court did not abuse its discretion in instructing, as LabCorp asked, that the jury could not award damages to deter the defendants or to “send a message.” (LabCorp Arg. § D.2; Valley Arg. § C.1).....	51
B.	A properly instructed jury found Valley directly liable based on overwhelming evidence of institutional negligence and vicariously liable for its staff’s negligence in failing to send LabCorp information identifying Brock’s chromosomal abnormality. (Valley Arg. § A).....	54

1.	The jury found Valley both directly liable for its corporate negligence and vicariously liable for the negligence of its agents in an undifferentiated verdict on six different grounds, any one of which supports the judgment against Valley.....	54
2.	The trial court correctly held that Valley owed its patients a duty to exercise reasonable care to provide adequate staffing, training and supervision of its employees. (Valley Arg. § A.1)	57
3.	The Wuths established Valley’s corporate negligence with overwhelming evidence, not “inferences.” (Valley Arg. § A.2).....	61
4.	Valley is vicariously liable for the negligence of its employees and agents, including its “borrowed” part-time genetic counselor. (Valley Arg. § D).....	63
5.	Valley’s finances bore directly on its claimed budgetary excuses for not hiring a full-time genetic counselor. (Valley Arg. § A.3).....	66
6.	The trial court did not err in preventing Valley from introducing new testimony not provided in discovery by its CR 30(b)(6) witness. (Valley Arg. § A.3).....	67
C.	The trial court properly refused to allow LabCorp to allocate fault to Dr. Harding without affirmatively pleading such a claim and supporting it by competent expert testimony.....	70
1.	LabCorp failed to plead or prove any allocation of fault to Dr. Harding. (LabCorp Arg. §§ C.1, C.2).....	70

2.	The trial court properly excluded LabCorp’s expert under ER 702 and 703 because he was unqualified and lacked a factual basis for his opinions, and not because of “procedural irregularities.”	72
a.	The parties thoroughly briefed Dr. London’s qualifications; there was no “procedural irregularity.” (LabCorp Arg. § C.3.a).....	72
b.	The court did not abuse its discretion in finding Dr. London unqualified under ER 702 and ER 703. (LabCorp Arg. § C.3.b)	75
c.	LabCorp could not rely on the Wuths’ geneticist or their perinatologist to allocate fault to Dr. Harding. (LabCorp. Arg. §§ C.2, C.3.a)	79
3.	The jury’s verdict that LabCorp’s and Valley’s negligence caused the Wuths’ damages, and the amount of damages, are unaffected by any failure to allocate fault to Dr. Harding.	83
4.	Absent evidence of collusion, the trial court had no basis to admit the high-low agreement between Dr. Harding and the Wuths. (LabCorp Arg. § D.1.b; Valley Arg. § E)	85
5.	The trial court committed no error in instructing the jury that the Wuths were fault free. (LabCorp Arg. §§ D.1.a, D.3).....	88
IV.	CONCLUSION	89

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Hartman v. United Bank Card Inc.</i> , 2012 WL 4758052 (W.D. Wash. Oct. 4, 2012)	65
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STATE CASES

<i>Adamski v. Tacoma Gen. Hosp.</i> , 20 Wn. App. 98, 579 P.2d 970 (1978)	63-64
<i>Adcox v. Children's Orthopedic Hosp. & Med. Ctr.</i> , 123 Wn.2d 15, 864 P.2d 921 (1993)	69, 71-72
<i>ALCOA v. Aetna Cas. & Sur. Co.</i> , 140 Wn.2d 517, 998 P.2d 856 (2000)	53
<i>Allstate Ins. Co. v. Wiley</i> , 954 So.2d 1273 (Fla. App. 2007).....	42
<i>Barton v. State, Dep't of Transp.</i> , 178 Wn.2d 193, 308 P.3d 597 (2013)	86
<i>Berger v. Sonneland</i> , 144 Wn.2d 91, 26 P.3d 257 (2001)	45-46
<i>Brown v. Labor Ready Northwest, Inc.</i> , 113 Wn. App. 643, 54 P.3d 166 (2002), <i>rev. denied</i> , 149 Wn.2d 1011 (2003)	65-66
<i>Bunch v. King County Dep't of Youth Servs.</i> , 155 Wn.2d 165, 116 P.3d 381 (2005).....	47, 49
<i>Burnside v. Simpson Paper Co.</i> , 123 Wn.2d 93, 864 P.2d 937 (1994)	2
<i>Bylsma v. Burger King Corp.</i> , 176 Wn.2d 555, 293 P.3d 1168 (2013).....	46

<i>Carnation Co., Inc. v. Hill</i> , 115 Wn.2d 184, 796 P.2d 416 (1990)	53
<i>Casper v. Esteb. Enterprises, Inc.</i> , 119 Wn. App. 759, 82 P.3d 1223 (2004)	68, 83
<i>City of Seattle v. Patu</i> , 147 Wn.2d 717, 58 P.3d 273 (2002)	61
<i>Collings v. City First Mortgage Servs., LLC</i> , 177 Wn. App. 908, 317 P.3d 1047 (2013), <i>rev. denied</i> , 179 Wn.2d 1028 (2014)	55
<i>Collins v. Clark County Fire Dist. No. 5</i> , 155 Wn. App. 48, 231 P.3d 1211 (2010)	41
<i>Crenna v. Ford Motor Co.</i> , 12 Wn. App. 824, 532 P.2d 290, <i>rev. denied</i> , 85 Wn.2d 1011 (1975)	80
<i>Czubinsky v. Doctors Hosp.</i> , 139 Cal.App.3d 361, 188 Cal.Rptr. 685 (Cal. App. 1983)	60
<i>Davis v. Microsoft Corp.</i> , 149 Wn.2d 521, 70 P.3d 126 (2003)	55
<i>Diaz v. State</i> , 175 Wn.2d 457, 285 P.3d 873 (2012)	86
<i>Dormaier v. Columbia Basin Anesthesia, P.L.L.C.</i> , 177 Wn. App. 828, 313 P.3d 431 (2013)	71
<i>Douglas v. Freeman</i> , 117 Wn.2d 242, 814 P.2d 1160 (1991)	59-60
<i>Duckworth v. Langland</i> , 95 Wn. App. 1, 988 P.2d 967 (1998), <i>rev. denied</i> , 138 Wn.2d 1002 (1999)	86
<i>Eng v. Klein</i> , 127 Wn. App. 171, 110 P.3d 844 (2005), <i>rev. denied</i> , 156 Wn.2d 1006 (2006)	77

<i>Erdman v. Lower Yakima Valley, Washington Lodge No. 2112 of B.P.O.E.</i> , 41 Wn. App. 197, 704 P.2d 150 (1985).....	44
<i>Hall v. Episcopal Long Term Care</i> , 54 A.3d 381, 400 (Pa. Super. 2012), <i>app. denied</i> , 620 Pa. 715 (2013).....	60
<i>Harbeson v. Parke Davis, Inc.</i> , 98 Wn.2d 460, 656 P.2d 483 (1983).....	1-2, 27, 32-36, 40-41, 45-46, 89
<i>Havens v. C & D Plastics, Inc.</i> , 124 Wn.2d 158, 876 P.2d 435 (1994)	33
<i>Hegel v. McMahon</i> , 136 Wn.2d 122, 960 P.2d 424 (1998)	46
<i>Humes v. Fritz Companies, Inc.</i> , 125 Wn. App. 477, 105 P.3d 1000 (2005).....	59
<i>Jenkins v. Snohomish County PUD No. 1</i> , 105 Wn.2d 99, 713 P.2d 79 (1986).....	50
<i>Johnson v. Carbon</i> , 63 Wn. App. 294, 818 P.2d 603, <i>rev. denied</i> , 118 Wn.2d 1018 (1991).....	82
<i>Johnston-Forbes v. Matsunaga</i> , 181 Wn.2d 346, 333 P.3d 388 (2014).....	75
<i>Jones v. City of Seattle</i> , 179 Wn.2d 322, 314 P.3d 380 (2013).....	80
<i>Kohfeld v. United Pacific Ins. Co.</i> , 85 Wn. App. 34, 931 P.2d 911 (1997).....	43
<i>Larson v. Downing</i> , 197 S.W.3d 303 (Tex. 2006)	77
<i>Leavitt v. St. Tammany Parish Hosp.</i> , 396 So.2d 406 (La. App. 1981).....	60
<i>Lewis River Golf, Inc. v. O.M. Scott & Sons</i> , 120 Wn.2d 712, 845 P.2d 987 (1993).....	42

<i>Lunsford v. Saberhagen Holdings, Inc.</i> , 166 Wn.2d 264, 208 P.3d 1092 (2009)	34
<i>McCluskey v. Handorff-Sherman</i> , 125 Wn.2d 1, 882 P.2d 157 (1994)	55
<i>McCluskey v. Handorff-Sherman</i> , 68 Wn. App. 96, 841 P.2d 1300 (1992), <i>aff'd</i> , 125 Wn.2d 1, 882 P.2d 157 (1994)	86
<i>McDougall v. Schanz</i> , 461 Mich. 15, 597 N.W.2d 148 (1999)	77
<i>McKernan v. Aasheim</i> , 102 Wn.2d 411, 687 P.2d 850 (1984)	35
<i>Miller v. Kenny</i> , 180 Wn. App. 772, 325 P.3d 278 (2014)	52
<i>Miller v. Peterson</i> , 42 Wn. App. 822, 714 P.2d 695, <i>rev. denied</i> , 106 Wn.2d 1006 (1986)	82
<i>Mina v. Boise Cascade Corp.</i> , 104 Wn.2d 696, 710 P.2d 184 (1985)	84
<i>Mohr v. Grantham</i> , 172 Wn.2d 844, 262 P.3d 490 (2011)	52
<i>Nielson v. Wolfkill Corp.</i> , 47 Wn. App. 352, 734 P.2d 961 (1987)	34
<i>Osborn v. Public Hospital Dist. 1, Grant County</i> , 80 Wn.2d 201, 492 P.2d 1025 (1972)	61
<i>Pedroza v. Bryant</i> , 101 Wn.2d 226, 677 P.2d 166 (1984)	57, 59
<i>Price v. State</i> , 114 Wn. App. 65, 57 P.3d 639 (2002)	46
<i>Putnam v. Wenatchee Valley Medical Center, P.S.</i> , 166 Wn.2d 974, 216 P.3d 374 (2009)	32, 65

<i>Queen City Farms, Inc. v. Central Nat. Ins. Co. of Omaha</i> , 126 Wn.2d 50, 882 P.2d 703, 891 P.2d 718 (1994)	76
<i>Scampone v. Grane Healthcare Co.</i> , 11 A.3d 967 (Pa. Super. 2010), <i>aff'd in part on other grounds sub nom. Scampone v. Highland Park Care Ctr., LLC</i> , 618 Pa. 363, 57 A.3d 582 (2012)	60
<i>Schmidt v. Coogan</i> , ___ Wn.2d ___, 335 P.3d 424 (2014)	45, 47
<i>Schoening v. Grays Harbor Cmty. Hosp.</i> , 40 Wn. App. 331, 698 P.2d 593, <i>rev. denied</i> , 104 Wn.2d 1008 (1985).....	58
<i>Sofie v. Fibreboard Corp.</i> , 112 Wn.2d 636, 771 P.2d 711, 780 P.2d 260 (1989)	40, 47
<i>State v. Davis</i> , 141 Wn.2d 798, 10 P.3d 977 (2000).....	36
<i>State v. Jordan</i> , 103 Wn. App. 221, 11 P.3d 866 (2000), <i>rev. denied</i> , 143 Wn.2d 1015 (2001).....	37
<i>State v. Perry</i> , 24 Wn.2d 764, 167 P.2d 173 (1946), <i>cert denied</i> , 343 U.S. 911 (1952).....	36
<i>Stedman v. Cooper</i> , 172 Wn. App. 9, 252 P.3d 764 (2012)	78
<i>Stewart-Graves v. Vaughn</i> , 162 Wn.2d 115, 170 P.3d 1151 (2007)	33
<i>Stiley v. Block</i> , 130 Wn.2d 486, 925 P.2d 194 (1996).....	59
<i>Turpin v. Sortini</i> , 31 Cal.3d 220, 182 Cal. Rptr. 337, 643 P.2d 954 (1982)	34

<i>Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993)	41
<i>Welsh v. Bulger</i> , 548 Pa. 504, 698 A.2d 581 (1997).....	60
<i>White v. Kent Medical Ctr., Inc., P.S.</i> , 61 Wn. App. 163, 810 P.2d 4 (1991).....	77
<i>Wlasiuk v. Whirlpool Corp.</i> , 81 Wn. App. 163, 914 P.2d 102 (1996), <i>modified by</i> 932 P.2d 1266 (1997)	55
<i>Young v. Key Pharmaceuticals, Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989).....	71, 76

STATUTES

42 U.S.C. §1211.....	33
RCW 2.36.080	39
RCW 4.22.070.....	70-71
RCW ch. 7.70.....	45-46, 58
RCW 7.70.020.....	58
RCW 7.70.030.....	58

RULES AND REGULATIONS

CR 8.....	71
CR 12	71
CR 30.....	67-68, 70
ER 408	86
ER 611.....	82
ER 702.....	72, 75, 76

ER 703.....	72, 75, 78
KCLCR 26.....	80
RAP 10.3.....	21, 27, 73, 88

CONSTITUTIONAL ARTICLES

Wash. Const., Article 1, § 12.....	33
Wash. Const., Article 1, § 21.....	40

OTHER AUTHORITIES

Kritzer, <i>Advocacy and Rhetoric vs. Scholarship and Evidence in the Debate Over Contingency Fees: A Reply to Professor Brickman</i> , 82 Wash. U. L. Q. 477 (2004)	47
Restatement (Second) Agency § 267 (1958).....	64
Tegland, 4 <i>Wash. Prac.: Rules Practice</i> 161 (6th Ed. 2013)	37
Tegland, 5A <i>Wash. Prac.: Evidence</i> § 408.1 (5th Ed. 2007).	86
Tegland, 5B <i>Wash. Prac.: Evidence</i> § 702.7 (5 th Ed. 2007).....	76
Tegland, 15A <i>Wash. Prac.: Handbook on Civil Procedure</i> § 88.6 (2014-15 Ed.).....	55
WPI 105.02.02, 6 <i>Wash. Prac.</i> 595 (6 th Ed. 2012).....	58-59, 61
WPI 105.02.03, 6 <i>Wash. Pract.</i> 602 (6 th Ed. 2012).....	64

I. INTRODUCTION

Respondents Brock and Rhea Wuth sought genetic testing from appellants Valley Medical Center and Laboratory Corporation of America because they knew that Brock carried a chromosome defect resulting in a 50% chance their offspring would inherit the severe birth defects that afflicted Brock's relatives. Through a combination of institutional incompetence and human error, Valley and LabCorp botched the genetic testing, giving the Wuths the false assurance that their 12-week fetus would be born free of the chromosome abnormality for which they specifically sought testing.

In *Harbeson v. Parke Davis, Inc.*, 98 Wn.2d 460, 467, 656 P.2d 483 (1983), the Supreme Court authorized "an action based on an alleged breach of the duty of a health care provider to impart information or perform medical procedures with due care" resulting in the birth of a child with birth defects and the parents' emotional anguish. *Harbeson*, which requires health care providers and laboratories to competently perform genetic testing and respects a patient's right to reproductive choice, provides an unassailable basis for the jury's verdict in this case.

A properly instructed jury had multiple grounds – only some of which appellants challenge – to find that the Wuths' damages

were caused by LabCorp's and Valley's failure to adopt policies to protect patients, to adequately staff, supervise and instruct their agents and employees, and by those individuals' lack of care and attention to their patient. LabCorp's and Valley's challenges to the trial court's discretionary evidentiary and trial management decisions were not preserved below, are without merit, and had no effect on the jury's general verdict that their negligence caused a lifetime of medical expenses for severely disabled Oliver Wuth and a lifetime of emotional anguish for his parents Rhea and Brock. The jury properly awarded those damages authorized by *Harbeson* and supported by substantial evidence. This Court should affirm.

II. RESTATEMENT OF THE CASE

A. Restatement of Facts.

This Court reviews the evidence in the light most favorable to the jury's verdict and against appellants Valley Medical Center ("Valley") and Laboratory Corporation of America ("LabCorp"). *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107-08, 864 P.2d 937 (1994). Appellants' truncated and skewed factual summaries ignore the overwhelming evidence of their negligence and of the Wuths' damages, in violation of the standard governing review of the jury's verdict in favor of the Wuths after a six-week trial. This

Court should rely on the facts supported by the record and fairly summarized below.

- 1. After genetic testing revealed that an inherited chromosomal abnormality caused his cousin's severe birth defects, Brock Wuth learned he was a carrier of the same defect.**

Respondents Brock and Rhea Wuth met in 1995, when Brock was 15 and Rhea was 17. They married in August 2000. (RP 571-72)

Brock's family had a history of birth defects. (RP 2245; Ex. 72) Brock's mother had a sister, Patsy, who was institutionalized and died before Brock was born. (Exs. 4, 72; RP 2243-44) Brock's cousin Jackie, born in 1988 to Brock's mother's brother, "has profound disabilities including terrible seizures, anti-social behavior, and obesity that confines her to a wheelchair." (Valley 44-45; see RP 597, 1484-87, 1723-24, 1729-33, 1821-22, 1971, 2210-15; Ex. 10) Brock was close to Jackie's older brother Ben, and was keenly aware of the toll Jackie's worsening condition had taken on his aunt and uncle and on the extended family. (RP 2247-48)

Until Jackie was 15, no one in Brock's family knew why she was so severely disabled. But in 2003, shortly after the technology to do so was developed, Children's Hospital tested Jackie and found

the genetic defect that explained her condition: a translocation of genetic material at chromosomes 2 and 9. (RP 1763-64, 1769, 2207-09) The geneticists at Children's identified with specificity the location of this defect, known as a "breakpoint" or ISCN, on the long arms of chromosome 2 and chromosome 9. (RP 944-49, 1768)

After the cause of Jackie's disability was discovered, the Children's genetic counselor recommended that other members of the extended family, including Brock, undergo genetic testing. (RP 1395-96) That testing revealed that Brock had inherited from his mother the genetic anomaly that caused Jackie's condition. Like his mother (and his mother's brother, Jackie's father), Brock has a "balanced" translocation – all the genetic material was present on chromosomes 2 and 9, but the two chromosomes exchanged material. (RP 944-48) But Jackie (unlike Brock, his mother, and Jackie's father) is missing some of her genetic code. Her translocation was "unbalanced": chromosome 2 had extra material that was duplicated from chromosome 9, but chromosome 2 was missing genetic material that did not appear on chromosome 9. (RP 949-50, 1767-69) This unbalanced translocation caused Jackie's birth defects. (RP 1766) Brock's balanced translocation

means that he has no symptoms of this genetic condition but is a carrier of the defect in chromosomes 2 and 9. (RP 944)

Brock and Rhea discovered from the genetic counseling they received at Children's that any future children were at risk because of Brock's balanced translocation. (RP 580, 944-46; Ex. 12) Brock has a 25% chance that any offspring would not inherit the defect at all and a 25% chance that any offspring would inherit a balanced translocation of chromosomes 2 and 9 (just as Brock has). But there was a 50% chance that any offspring would inherit an unbalanced translocation of chromosomes 2 and 9 – one resulting in the type of birth defects that afflicted Brock's cousin Jackie. (RP 584, 1772-73; Ex. 12)

The Wuths received a detailed written report from Children's in June 2003 explaining Brock's genetic condition and the exact coordinates of the 2;9 breakpoints. (RP 580; Exs. 11, 12)

2. Rhea Wuth's obstetrician referred the Wuths to Valley's Maternal-Fetal Medicine Center for genetic testing and counseling when Rhea was 12 weeks pregnant in December 2007.

Brock and Rhea had one child, Ian, born in May 2002 – before they knew the genetic reasons for Jackie's condition, or that Brock was a carrier of the chromosomal abnormality. Ian either

does not have the translocation or has a balanced translocation; he has no symptoms of the genetic defect. (RP 579)

Brock and Rhea wanted to have more children, but after the genetic testing and counseling at Children's in 2003, they recognized the risks because of Brock's translocation. (RP 577-80) The Wuths did not want to bring a child with Jackie's disabilities into the world. (RP 587-88, 1398) The Wuths therefore carefully followed all the recommendations they had received when Brock was tested, including exploring in vitro fertilization. (RP 590, 596) They brought the Children's report on Brock's genetic condition, in an orange folder, to each medical appointment related to Rhea's pregnancies. (RP 583, 591; Exs. 11, 12, 50) In the five years after Ian's birth in 2002, Rhea became pregnant seven times. Six of these pregnancies ended in miscarriage, likely caused by the 2;9 translocation identified in the Children's report. (RP 589, 1245, 1255, 4511)

In November 2007, Rhea was pregnant again. If genetic testing revealed that the fetus had an unbalanced translocation, the Wuths intended to terminate the pregnancy. (RP 596-98, 1373-74, 1750, 2375) This time, however, Rhea's pregnancy progressed well into the first trimester without incident, and the Wuths were

hopeful that the fetus was healthy. (RP 1371-73, 1436) The Wuths' hopes were further bolstered when Rhea had normal ultrasounds before and after appointments with her obstetrician on December 6, 2007. (RP 601)

The Wuths had told Rhea's obstetrician about Brock's translocation and about his cousin who had severe disabilities. Rhea told her obstetrician she would not bring a child with an unbalanced translocation to term, and gave her the Children's report on Brock's condition from her orange folder. (RP 597, 603) At the conclusion of her December 6 visit, Rhea's obstetrician made an appointment for Rhea with the Maternal-Fetal Medical Clinic at Valley Medical Center to obtain genetic material from the fetus to test for the 2;9 translocation and for additional genetic counselling, as recommended by Children's. (RP 600, 2063; Ex. 12-02)

Fetal genetic samples can be acquired through chorionic villus sampling (CVS) or amniocentesis. (RP 580, 599-600, 940, 1844; Ex. 12-02) CVS, which must be performed by the 13th week of pregnancy, is an intrusive procedure in which a physician accesses the placenta through the vagina to cut away a small sample. (RP 778) Amniocentesis, while also intrusive, cannot be performed until the 16th week of pregnancy. (RP 802) The Wuths wanted CVS

so they could terminate the pregnancy early if the lab testing of the genetic sample revealed that the fetus had an unbalanced translocation. (RP 598-99, 602, 1430, 1435)

3. Valley and its employees and agents were negligent in scheduling and obtaining the Wuths' genetic testing.

In violation of the governing standard of review, Valley presents a skewed version of events that ignores the overwhelming evidence from which the jury could find that Valley was negligent in “one or more” of the ways alleged by the Wuths:

- (a) Negligently failing to send the clinical information that identified the chromosomes and breakpoints to LabCorp with the test requisition forms and CVS sample.
- (b) Negligently staffing its Maternal Fetal Medicine Clinic.
- (c) Negligently training its schedulers and medical assistants at its Maternal Fetal Medicine Clinic.
- (d) Negligently scheduling Rhea Wuth to be seen at their Maternal Fetal Medicine Clinic on a day when there was no Genetic Counselor at the Clinic.
- (e) Negligently failing to communicate to its employees Valley's policy of referring patients to Swedish Hospital Maternal Fetal Medicine Clinic when a Genetic Counselor was not available, negligently failing to train its employees on how to follow this policy, and negligently failing to refer Rhea Wuth to Swedish.

(CP 11607) That evidence is summarized below:

- a. **Valley cut its genetic counseling to a single day each week, which was inadequate to serve patients in its increasingly profitable Maternal-Fetal Medicine Clinic.**

Valley opened a Maternal-Fetal Medical Clinic in 2005 so it could apply for a level III neonatal nursery certification. (RP 830-32) Valley was the sole owner and operator of its Maternal-Fetal Medicine Clinic, employing its staff and exclusively profiting from its revenue. (RP 907, 923) Valley contracted with Obstetrix Medical Group of Washington, which also provided maternal-fetal (perinatal) care at Swedish, Evergreen, and Overlake Hospitals (RP 917), to provide physicians to see patients at Valley's Maternal-Fetal Medicine Clinic and to perform procedures necessary to obtain samples for LabCorp, the laboratory chosen by Valley to do genetic testing for Clinic patients. (RP 830, 916) Obstetrix's physicians had no authority over staffing of the Valley Clinic, nor over the Clinic's operation. (RP 907, 923)

Valley initially staffed its Clinic with a single medical assistant, Cathy Shelton, who served as the receptionist and did all scheduling, blood draws, and call-out of results. (RP 832) As the Clinic's business increased, Valley hired ultrasound technicians

and, in late 2006, hired a genetic counselor to work three days a week. (RP 832-34)

A genetic counselor is the most knowledgeable person in a maternal-fetal medicine clinic regarding questions of genetic testing, and serves as the clinic's liaison with the laboratory that performs the tests. (RP 651-54, 750-51, 3365) Genetic counselors have a Master's degree. (RP 4805) With two years of training solely in genetics, genetic counselors have more current and broader expertise than maternal-fetal medicine physicians. (RP 651, 750, 4475) A genetic counselor fills out lab test requisition forms, ensures that the necessary paperwork gets to the lab, communicates with the lab on the appropriate tests to perform, and reports and explains test results to patients and their physicians. (RP 651, 751, 840-46, 991-93, 4683-84, 4977) All of the major hospitals operating in King County, except Valley, staff their maternal-fetal medicine clinics with genetic counselors fulltime. (RP 670, 4467)

But Valley's Maternal-Fetal Medicine Clinic was severely understaffed in many ways when the Wuths' obstetrician called to schedule Rhea's CVS in December 2007. (RP 669, 704, 835-36, 1087, 2295, 2312) Valley had seen the number of patients in its Maternal-Fetal Medicine Clinic double and its patient revenue grow

from \$1.3 million in 2006 to \$2.9 million in 2007. (RP 1084, 2301-03; Ex. 32) Yet Valley was not even spending the \$980,000 it had budgeted for patient care in the Clinic, including genetic counselors and other health care employees. (RP 664) Valley had not replaced the Clinic's full-time manager, who had quit in early 2007, and did not replace the Clinic's sole genetic counselor, who had been working three days a week, when she went on a long-planned maternity leave in fall 2007. (RP 1086-87, 4422-26, 4469-70) Valley instead contracted with Swedish Hospital for one of its genetic counselors, Elizabeth Starkey, to work at Valley only one day per week, reducing the Clinic's ability to provide genetic counseling from three days a week to one. (RP 4681-82)

b. Valley, in violation of its own guidelines and the standard of care, scheduled Rhea's procedure on a day when no genetic counselor was present.

Valley had a written policy requiring patients undergoing genetic testing to be seen by a genetic counselor. (Ex. 22-01) Valley's patient referral sheet, which Rhea's obstetrician faxed to Valley when she made the appointment, expressly stated that Rhea should be seen by a genetic counselor. (Ex. 13-01) When she scheduled Rhea's appointment on December 6, 2007, Rhea's

obstetrician also faxed Valley the Children's report identifying Brock's translocation, so that the Clinic and the lab that would perform the necessary genetic tests could determine whether the fetus had inherited an unbalanced translocation. (Ex. 13; RP 4407, 4497)

Valley also had a policy to send patients who needed to be seen by a genetic counselor to Swedish, which had genetic counselors fulltime, if Valley's Clinic did not have a genetic counselor available when a patient was to be scheduled for a procedure. (RP 833, 4470-71) But because Valley had not replaced the Clinic's manager by December 2007, Valley had not trained its patient service representative who was responsible for scheduling patients regarding the policy. (RP 2310-12, 2693, 5002, 5196)

Even though Rhea's obstetrician ordered genetic counseling with the anticipated genetic testing, and in violation of its own scheduling guidelines and the governing standard of care, Valley scheduled Rhea's appointment for a day when no genetic counselor would be in the Clinic – New Year's Eve, December 31, 2007. (RP 647-48, 1081-83, 1095, 2307) On the day of her scheduled appointment, Rhea was 12 weeks and one day pregnant, less than

one week away from the cutoff for performing CVS. (RP 751, 1095, 4560)

- c. **Valley's medical assistant did not follow Dr. Harding's instruction to send Brock's genetic report with the fetal tissue sample so LabCorp could determine whether the fetus had the chromosomal abnormality.**

Dr. James Harding, a perinatologist with Obstetrix, was scheduled to perform Rhea's CVS procedure at Valley on December 31. (RP 4301) The Wuths brought their orange folder with them to their Clinic appointment and gave Dr. Harding another copy of Brock's genetic test report, which Rhea's obstetrician had earlier faxed to the Clinic. (RP 923, 1739, 1896, 4406; Ex. 14-04-05)

Valley's violation of its scheduling guidelines and its failure to staff a genetic counselor placed Dr. Harding in a "horrible position." (RP 749, 1085, 1094-96, 4561) It was New Year's Eve. Rhea could not be rescheduled for CVS before the remaining 6-day "window" for the procedure closed. (RP 749, 805, 927-28, 1095, 4304, 4560) Because Valley had scheduled the appointment for a day when no genetic counselor was in the Clinic, after reviewing Brock's report Dr. Harding spent half an hour with the Wuths discussing the translocation, Brock's family history, and the relative

risks and benefits of CVS and amniocentesis. (RP 776-77, 1898, 1900, 4327)

The Wuths were knowledgeable patients, and had been previously counseled about genetic testing and the risks and consequences of a child being born with an unbalanced translocation. (RP 777, 4303, 4559) The Wuths reiterated that they wanted CVS, so they could be advised of any genetic abnormality and terminate the pregnancy before they would have to talk to family about the pregnancy. (RP 780, 4559) Each of the perinatal experts testifying at trial confirmed that Dr. Harding's decision to proceed with CVS was reasonable under the circumstances and complied with the standard of care. (RP 752-53, 1110-11)

The CVS procedure was uneventful, and Dr. Harding was able to obtain a good genetic sample from Rhea's placenta. (RP 611) On Dr. Harding's instruction, Valley's medical assistant Cathy Shelton wrote "family history, unbalanced translocation" on the requisition form that Valley used to send samples to LabCorp, the laboratory with which Valley had contracted to do the Clinic's genetic testing. (RP 801, 4410; Ex. 19-14) The "face sheet" of the form also disclosed Rhea's history of seven previous miscarriages. (Ex. 19-15: "SABx7;" RP 1245, 2675, 3171, 3589, 4978-79) The

information provided to LabCorp was sufficient to put the lab on notice that the sample came from a “high risk” fetus. (RP 1254)

Usually, a genetic counselor would be responsible for completing the lab forms for ordering genetic testing and ensuring that the lab received all relevant paperwork. (RP 991-93, 4839, 5005) Dr. Harding knew that the lab “absolutely” needed to know the precise location of Brock’s 2;9 translocation to know what they were looking for. (RP 4409) Because Valley had not staffed the Clinic with a genetic counselor on the day of Rhea’s CVS procedure, Dr. Harding himself made a copy of Brock’s report and handed it to Valley’s medical assistant, Ms. Shelton, to send to LabCorp with the tissue sample. (RP 798, 4407) Every expert testified that Dr. Harding met the standard of care by instructing Ms. Shelton to send Brock’s report with the sample and by relying on Valley’s medical assistant to send the sample to LabCorp with the required information and attachments, including Brock’s report. (RP 697, 1100, 2607)

Valley’s medical assistant, Ms. Shelton, had no memory of the Wuths, of their Clinic appointment on December 31, or of whether she followed Dr. Harding’s instruction to send Brock’s report to LabCorp with the genetic sample and requisition form.

(RP 4979, 5004-05) Ms. Shelton testified it was her “practice” to staple documents that were going to the lab immediately, even if she was in the middle of completing the form. (RP 4981-82) Ms. Shelton also testified that she “more than likely would” check the box on the requisition form noting that paperwork was attached if she was sending additional documents with the sample. (RP 5005-06)

For unexplained reasons, Ms. Shelton failed to send Brock’s report with the genetic sample that was to be tested for the translocation. LabCorp’s requisition form is completed in triplicate. (RP 5052) The top copy of the requisition form received by LabCorp did not have a “check” in the box to be “check[ed] if paperwork to be sent with sample.” (Ex. 19-13, reproduced at LabCorp Br. 7) LabCorp’s files did not contain a copy of Brock’s report. (Ex. 19; RP 689, 980-81) And Valley’s copy of Brock’s report did not have the barcode that would have been placed on the document had it been made part of Rhea’s file. (Ex. 14-04-08; RP 689)

Ms. Shelton’s failure to send Brock’s report to LabCorp as instructed by Dr. Harding violated the standard of care. (RP 698, 4861) Valley asserts that the jury never “answered the ‘big

question' of whether Valley's agent, Ms. Shelton, actually deviated from the standard of care." (Valley Br. 22) But in exonerating Dr. Harding and imposing liability on Valley, the jury's verdict makes clear that contention is without merit.

4. LabCorp, knowing that Valley had ordered genetic testing for a family history of chromosomal abnormality, failed to take the most basic steps to determine the location of the genetic defect.

The jury also had overwhelming evidence to find that LabCorp breached the standard of care of a medical laboratory performing genetic testing in "one or more" of the four ways the Wuths alleged:

(a) If it is concluded that clinical information that identified the chromosomes and breakpoints was sent by Valley to LabCorp, plaintiffs claim that defendant LabCorp negligently misplaced or lost the clinical information that identified the chromosomes and breakpoints.

(b) Plaintiffs claim the defendant LabCorp negligently failed to contact Valley and ask them to send clinical information with the chromosomes and breakpoints, regardless of whether LabCorp lost the information or it was not sent to LabCorp by Valley with the test requisition forms and CVS sample.

(c) Plaintiffs claim the defendant LabCorp negligently failed to correctly identify the unbalanced translocation in its analysis of Rhea Wuth's CVS sample.

(d) Plaintiffs claim defendant LabCorp negligently failed to recommend a test that would have identified the unbalanced translocation in Rhea's CVS sample.

(CP 11608)

The laboratory performing genetic testing is responsible for determining the most appropriate test. (RP 2628-29, 3453, 4798-99) Had LabCorp received Brock's report, it would have discovered the unbalanced 2;9 translocation that the Wuths feared, because it was readily discernible from a standard karyotype of chromosomes 2 and 9.¹ (RP 1154-55, 1182, 1193, 3361-62, 4782) With the knowledge that they were looking for an abnormality in chromosomes 2 and 9, each of the cytogeneticists who examined the karyotype was able to identify the anomaly that would have warned the Wuths that the fetus had an unbalanced translocation. (RP 1193, 1208, 3442, 3842, 3539; *see also* RP 3342, 4780-82)

Even without having the precise breakpoints identified in the Children's report, however, the information that LabCorp indisputably did receive – the notation of a “family history, unbalanced translocation” on the requisition form – should have raised “a huge red flag” (RP 973, 3572), and required LabCorp to

¹ A karyotype is a visual display of chromosomes taken from a magnified blood or tissue sample. A cytogeneticist in the genetic testing laboratory reviews the karyotype to identify abnormalities. (RP 941-42, 1210)

seek additional information – particularly the precise location of the translocation.² LabCorp’s own procedures required it to follow up when such information is missing. (Ex. 37-01) LabCorp never did so. (RP 3366)

LabCorp assigned a trainee, three days away from his last day at work, to perform the karyotype testing on the Wuths’ genetic sample. (RP 1178, 2955-57) The trainee had quit after less than 18 months on the job in part because of the workload pressure imposed by LabCorp’s “productivity requirements for technologists and trainees.” (RP 3390; *see* Ex. 48; RP 3437, 3559-60) The trainee did not even look at the requisition form, which would have told him that the purpose of the test was to look for a translocation. (RP 987, 3610-11) And although LabCorp’s policy required that a supervisor check the trainee’s work before it was sent for review by the lab’s cytogenetics director, no one did so. (RP 3382-83, 3555)

Instead, only LabCorp’s director Frederick Luthardt looked at the trainee’s report. (RP 3555) Dr. Luthardt declared the sample

² The experts testifying at trial explained to the jury that knowledge of a family history of translocation must have come from genetic testing, and that the breakpoint thus was necessarily known and the subject of a written report that LabCorp should have tried to acquire before completing its testing and reporting the results. (RP 973-74, 980-82, 1161, 1320-21, 3166, 3370, 3825-27)

normal even though he had before him the requisition form disclosing the family history of translocation. Although at trial he agreed that “in hindsight” someone should have called (RP 3380), Dr. Luthardt did not call Dr. Harding or Valley. (RP 3551) LabCorp’s own cytogenetics expert conceded more should have been done. (RP 3561-62, 3569-72)

LabCorp ignores all this evidence, including the fact that the lab, and not the perinatologist or patient, is responsible for determining the appropriate test. (RP 764) It instead asserts that Dr. Harding and the Wuths should have *ordered* a FISH test³ (LabCorp Br. 1, 5), going so far as to argue that “Rhea later testified that she told Dr. Harding that a FISH test was needed.” (LabCorp Br. 6, citing RP 611)⁴ In a summary judgment order that is not

³ FISH is an acronym for fluorescent in situ hybridization, a more sophisticated genetic testing tool than microscopic analysis of chromosomes on karyotypes. FISH testing probes specific chromosomes using fluorescence to determine whether DNA is missing at end of the chromosome. (RP 957)

⁴ LabCorp miscites the testimony at RP 611, which does not even include the term “FISH test.” Rhea testified at RP 611 that she told Dr. Harding she wanted CVS on December 31 because “I need to know now, because I needed to know whether I needed to terminate the pregnancy or not.” A few minutes earlier, Rhea had testified that had a genetic counselor been available, “thinking back on it,” she might have discussed with a genetic counselor what she “had learned about FISH testing at Children’s.” (RP 609-10)

challenged on appeal,⁵ the trial court dismissed any claim that Dr. Harding was negligent for failing to order a FISH test “based solely on a statement by Rhea Wuth that a FISH test would be needed.” (CP 3141)⁶

LabCorp missed the translocation entirely, reporting a “normal male karyotype.” (Ex. 19-05) LabCorp’s “canned” (RP 1186) “stock” (RP 985) “boilerplate” (RP 1026) disclaimer that the “result does not exclude the possibility of subtle rearrangements below the resolution of cytogenetics or congenital anomalies due to other etiologies” (Ex. 19-05), was insufficient to put the Wuths or their physicians on notice that LabCorp had not even looked for the translocation, particularly given that LabCorp’s report itself noted that the “indication” for the testing was a family history of unbalanced translocation. (RP 984-85, 1186-88, 2602-03, 2930-31,

⁵ LabCorp assigns error to the summary judgment order (LabCorp Br. 4) but does not identify an issue or argue the assignment of error. RAP 10.3(a)(4), (6).

⁶ Similarly, no expert testimony supports LabCorp’s and Valley’s assertion that Dr. Harding was at fault for failing to note on the requisition form an “abnormal” ultrasound on the day the CVS was performed. The December 31 ultrasound showed a nuchal translucency or cystic hygroma, a “fold” in the fetal neck area associated with genetic abnormalities. (RP 738) Based on this ultrasound finding, Dr. Harding ordered a fetal echocardiogram and a repeat ultrasound, both of which showed that the translucency had resolved. (RP 752) Dr. Harding’s decision not to include the original ultrasound findings on the requisition form was not a violation of the standard of care, and would not affect the test the lab chose to perform. (RP 754, 925, 2636, 5104)

3887, 4714; Ex. 19-05) LabCorp’s “boilerplate” disclaimer was in any event never communicated to the Wuths, who were not sent a copy of the report and instead heard the news from Valley’s “borrowed” genetic counselor that LabCorp’s genetic testing had revealed the fetus to be a “normal male.” (RP 1434, 1742, 2777)

5. **Valley’s part-time genetic counselor reported the “normal” test results to the Wuths and their physicians without determining that LabCorp had failed to look for the very abnormality for which the Wuths had sought genetic testing.**

There was also overwhelming evidence to support the Wuths’ sixth theory of liability against Valley: that the Clinic’s part-time genetic counselor, Elizabeth Starkey, working in the Clinic only one day per week, breached the standard of care in failing to review Rhea Wuth’s chart, which would have alerted her that LabCorp “did not know which chromosomes and breakpoints should be examined at the time they did their testing, and fail[ed] to follow up with the lab.” (CP 11607; RP 698)

Ms. Starkey was responsible not just for counseling patients at the Valley Maternal-Fetal Medicine Clinic, but also for reporting lab test results to Clinic patients. (RP 4715-16) Ms. Starkey had only been working at Valley one day a week since mid-November,

and did not work in the Clinic on any day in the three weeks between December 18, 2007, and January 8, 2008. (RP 4752) She had never met or spoken with the Wuths, was not familiar with the Wuths' history, had not filled out the requisition to LabCorp for genetic testing on Rhea's CVS sample, and was not familiar with Valley's filing system or forms or the usual practice of Valley's regular genetic counselor or of its medical assistant, Ms. Shelton. (RP 4733-36, 4755)

Ms. Starkey reviewed LabCorp's report of a "normal male karyotype" on January 8, 2008. (RP 4756) Because of her one-day-a-week schedule, Ms. Starkey often would have to make a "ton" of calls based on accumulated test results when she was in the Valley Clinic. (RP 4752) Ms. Starkey notified Rhea by telephone that the genetic test results were "normal," and told Rhea that the fetus was "not even a carrier of the translocation." (RP 1434) She sent a letter to Rhea's obstetrician "confirm[ing]" that the fetus was a "chromosomally normal male." (Ex. 14-31) Ms. Starkey did not send LabCorp's actual report itself to the Wuths or their physicians. (RP 4755; Ex. 131.0105) Because the results were "normal," Ms. Starkey did not communicate the test results to Dr. Harding. (RP 4716, 4782)

Had she taken the time to review Rhea's chart, Ms. Starkey would have realized that LabCorp's genetic report failed to even address the translocation for which the Wuths had gone to Valley for genetic testing. (RP 698-99, 4715) The jury heard expert testimony that Ms. Starkey's conduct violated the standard of care for a genetic counselor. (RP 650, 698, 1015-16)

6. Oliver faces a lifetime of extraordinary medical expenses and his parents face a lifetime of anxiety and distress.

The Wuths were overjoyed when Valley and LabCorp told them their fetus was "chromosomally normal," and Rhea's pregnancy proceeded to term. (RP 1374-75, 1434, 2377, 2784-85) But their joy was shattered when Oliver was born on July 12, 2008. Oliver looked "vacant" and "broken." (RP 1442, 1479, 2784-85) Oliver did not feed normally and rapidly lost weight. (RP 1442-44) Oliver was not proportional – his feet and toes were tiny; his fingers were long, but his hands were tiny. (RP 1446) Oliver had inverted nipples and a buried penis. (RP 1446; 1942) His head was bent and turned; his legs would not straighten. (RP 1444-45; 1942)

After months of despair over Oliver's condition and failure to progress (RP 1401, 1448; Ex. 8), in February 2009 the Wuths had Oliver tested at Children's. (RP 1451) The Wuths were devastated

to learn that because Oliver had inherited the same unbalanced 2;9 translocation as Brock's cousin Jackie, he had been born with profound mental and physical disabilities. (RP 1317, 1451-52) Oliver, age 5½ at trial, has an IQ in the 60s. (RP 3045; *see also* RP 1954) His vision, judgment, and fine motor skills are in the impaired or severely impaired range. (RP 1954-55; Ex. 65, attached as Appendix A) Oliver cannot run, walk up stairs, or talk beyond a few dozen words understandable to his parents. (RP 1955-56, 2249-50) He is not toilet trained. (RP 1950) He will never work. (RP 1985, 4054) He will need 24/7 attendant care for the rest of his life. (RP 1974-75, 1982-83, 2425-31)

The Wuths must explain Oliver's disability to strangers and friends alike and endure estrangement from other parents. (RP 1726, 2800) Their older son Ian suffers prejudice and ostracism because of his brother's disability. (RP 2854-55) Because of Oliver's overwhelming needs, the Wuths cannot spend the time they want with Ian, nor have the large family they had planned. (RP 1524, 1723-25, 1905-06, 2798)

The Wuths must ask Oliver to show them affection. (RP 1733-34) The Wuths worry that Oliver, like Brock's cousin Jackie, will develop antisocial behaviors and be unable to feel empathy, and

that he will develop the medical conditions that began to afflict Jackie, who began suffering from obesity and seizures when she was older than Oliver is now. (RP 1723-24, 1729-39, 2785-86) The Wuths worry who will care for Oliver, who has a normal life expectancy, as they age and after they are gone. (RP 1728-29, 2785-86; *see also* RP 1490-94)

B. Procedural history.

Like their statements of “fact,” appellants’ procedural narratives contain significant omissions – most glaringly, the rulings that they either invited or did not oppose in superior court.

The Wuths filed this action against Valley, LabCorp, Dr. Harding and his employer Obstetrix in December 2010. (CP 1-10) They amended their complaint twice, in June 2011 and March 2013. (CP 29-40, 1616-28) Neither LabCorp nor Valley ever asserted Dr. Harding’s negligence, either by cross-claim or affirmative defense. (CP 2232-37, 2478-86)

The case was originally assigned to King County Superior Court Judge LeRoy McCullough, who entered several summary judgment rulings that narrowed the claims and defenses. Judge McCullough dismissed the defense of comparative fault, holding that the Wuths were fault free as a matter of law (CP 1112); that Dr.

Harding was Valley's apparent agent (CP 1111); and that Valley was also vicariously liable for the acts of its medical assistant Shelton as well as its schedulers. (CP 2244, 2475) Judge McCullough granted in part Dr. Harding's motion for summary judgment dismissing the claim that Dr. Harding was negligent in failing to order a FISH test. (CP 3141) Neither appellant challenges any of these rulings on appeal. RAP 10.3(a)(4), (6).

The court limited the Wuths' claims under *Harbeson* to Brock's and Rhea's mental anguish and emotional distress and the past and future extraordinary medical expenses incurred by Oliver for his care, precluding any award for the normal expense of raising a child, for Oliver's future ordinary living expenses or his diminished earning capacity, or for general damages on a "wrongful life" claim. (CP 2248) (addressed in Arg. § A, *infra*) The court also held that part-time genetic counselor Starkey was Valley's apparent agent as a matter of law. (CP 1111) (Arg. § B.4) In partially denying Dr. Harding's motion for summary judgment, Judge McCullough granted Dr. Harding's motion to strike gynecologist Dr. London as an expert witness, on the ground that he lacked sufficient qualifications and experience to testify to the standard of care of a

perinatologist practicing in a maternal-fetal medicine clinic. (CP 3141; 7/18 RP 46-48) (Arg. § C.1-2)

The order striking Dr. London as an expert witness was entered July 18, 2013, more than six weeks before the discovery cutoff under an amended case scheduling order. (CP 3141, 14290) LabCorp never designated another expert after Dr. London was disqualified, instead moving for reconsideration of the July 18 order. (CP 3151-56) Following Judge McCullough's denial of reconsideration (CP 6383-85), Judge Catherine Shaffer ("the trial court"), to whom the case was reassigned for trial (CP 6382), granted Dr. Harding's motion in limine to exclude Dr. London's testimony. (CP 11752) (Arg. § C.2)

On September 27, 2013, Dr. Harding told Valley and LabCorp that they had that very day finalized a high-low agreement with the Wuths. (CP 13650, 14280) Plaintiffs produced a copy to Valley's and LabCorp's counsel several days later and disclosed its terms to the court on October 11, 2013. (CP 4966-68; 10/11 RP 6) Under the high-low agreement, Dr. Harding remained a party, agreeing to pay a minimum of \$500,000 up to a maximum of \$2 million, the limits of his insurance coverage, depending on the jury's verdict establishing his fault for the Wuths' damages. (CP

14277-80) The trial court excluded reference to the high-low agreement during trial unless the defendants could show collusion between Dr. Harding and the Wuths. (10/22 a.m. RP 105-06; CP 10821) (Arg. § C.4)

During juror voir dire, the trial court allowed *defense counsel* to use “wrongful birth” and “wrongful life” – terms Valley now claims were “confusing” or “misleading” (Valley Br. 42) – as a “shorthand” to see if jurors had had any exposure to those ‘buzz words.’” (10/21 RP 5-9) Using a questionnaire that all parties approved, the trial court seated a jury, including individuals who held pro-life views (10/21 RP 211), without objection excluding only those who stated that they would be unable to follow the court’s instructions. (10/21 RP 148, 185, 234; 10/22 a.m. RP 35, 55, 76; 10/22 p.m. RP 8, 24, 45, 67-68, 74) (Arg. § A.2)

Valley’s claim that the trial court then subjected it to “strict liability” (Valley Br. 2) is sheer fantasy. (Arg. §§ B.2-4) Valley complains that the Wuths “painted the picture that Valley acted with willful indifference, . . . practicing ‘corporate medicine’ with treatment decisions based on the return on investment rather than the quality of patient care.” (Valley Br. 38, citing RP 2345, 4330, 5308) But the Wuths only pointed out Valley’s irrefutable

increased income from the Clinic while it spent less than it had budgeted for patient care and staffing (RP 2345), and in arguing liability only told the jury that it should consider whether defendants had put the “business of medicine” ahead of “the practice of medicine.” (RP 5308)

Valley did not propose a verdict form that would have allowed the jury to differentiate among the six different theories of liability asserted by the Wuths. (CP 5791-93) (Arg. § B.1) The trial court recognized that Valley’s liability was not limited to the “corporate negligence” theory it argues on appeal (1/17 RP 33-34); it also instructed the jury that Valley could be vicariously liable for the negligence of its agents under pattern instructions that placed the burden of proving negligence, causation and damages on the Wuths. (CP 11610-14)

The trial court also expressly prevented the Wuths from arguing for punitive damages. (CP 8804) The trial court drew a clear line permitting argument generally about the dual purpose of our tort system – compensation and deterrence – but prohibiting any argument about “sending a message.” (CP 8804; RP 198, 5257, cited at Valley Br. 38) And when the trial court thought Dr. Harding’s counsel had “crossed the line” – LabCorp falsely claims

that the Wuths' counsel had (LabCorp Br. 14) – it provided a curative instruction, approved by LabCorp (RP 5385), that clearly told the jury that the purpose of damages was to compensate, not to deter. (RP 5381, 5388-89) (Arg. § A.5)

Under a damages instruction that neither appellant challenges (CP 11619-20; *see* Valley Br. 4, LabCorp Br. 4), the jury found that LabCorp and Valley were both negligent, and equally responsible for the Wuths' damages, and that Dr. Harding did not breach the standard of care, awarding \$25 million for Oliver's past and future medical expenses and \$25 million to Brock and Rhea for general damages. (CP 11719-20) The trial court denied LabCorp's and Valley's CR 59 motion (CP 14209-11), relying on its firsthand view of the Wuths' pain (1/24 RP 72: "I guess you had to be here to see it") in rejecting LabCorp's and Valley's contention that the Wuths failed to establish that their anguish was offset by the emotional benefits of parenting a disabled child. (Arg. § A.3)

III. ARGUMENT

A. **The trial court properly adhered to *Harbeson* in authorizing the Wuths' claim for medical negligence, in seating a jury that would follow the court's instructions, and in its discretionary evidentiary rulings.**

1. ***Harbeson* requires health care providers and laboratories to competently perform genetic testing and respects the right to reproductive choice.** (Valley Arg. § B; LabCorp Arg. § B)

Parents have the “right to prevent the birth of a defective child” – and health care providers have the duty to use reasonable care and “impart to their patients material information as to the likelihood of future children being born defective, to enable the potential parents to decide whether to avoid the conception or birth of such children.” *Harbeson v. Parke Davis, Inc.*, 98 Wn.2d 460, 472, 656 P.2d 483 (1983). This health care providers' duty in tort “promote[s] societal interests in genetic counseling and prenatal testing, deter[s] medical malpractice, and at least partially redress[es] a clear and undeniable wrong.” *Harbeson*, 98 Wn.2d at 473 (quotation and citation omitted).

In this sense, a “wrongful birth” claim is no different than any other medical negligence claim, and firmly “rooted in the common law tradition.” *Putnam v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974, 982, ¶13, 216 P.3d 374 (2009).

Further, *Harbeson*'s recognition of the "right to prevent the birth of a child is based on the parents' constitutional right to reproductive autonomy." *Stewart-Graves v. Vaughn*, 162 Wn.2d 115, 130, ¶28, 170 P.3d 1151 (2007). No "development in case law and society" (Valley Br. 29) and no intervening "public policy" (LabCorp Br. 20) has undermined the holding of *Harbeson*, which the Court recently reaffirmed in *Stewart-Graves*, 162 Wn.2d at 129-33, ¶¶ 24-35.

In the absence of legal authority,⁷ Valley and LabCorp instead rely on sophistry, arguing that those disabled by chromosome abnormalities are no longer considered "defective." But whether Oliver is called "developmentally delayed," "disabled," or "retarded" has no bearing on his medical condition, the grievous nature of appellants' medical negligence, or the dire consequences it will continue to impose on the Wuths. LabCorp's platitude that "people with disabilities have equal rights under the law" (LabCorp Br. 17, citing the American with Disabilities Act, 42 U.S.C. §1211, et seq.) is no more relevant here than it would be to any tortfeasor's

⁷ LabCorp cites Wash. Const., Article 1, § 12 (LabCorp Br. 17), but identifies no privilege or immunity bestowed upon any identifiable class and provides no argument or authority that the medical negligence claim at issue here violates its constitutional rights. Neither the Wuths nor this Court can address LabCorp's hazy constitutional claim, or the obvious standing issues it raises, in the absence of a reasoned argument. See *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 169, 876 P.2d 435 (1994).

argument that an award of future medical expenses for debilitating and permanent injuries somehow “denigrates” the disabled.

Neither Valley nor LabCorp addresses the true reasons for their attack on *Harbeson*: to undermine the constitutional right to reproductive choice and immunize health care providers from liability for negligence in performing genetic testing. The *Harbeson* Court squarely rejected this doubtful “policy” and the “all people have value” bromide that LabCorp repeats here:

[I]t is hard to see how an award of damages to a severely handicapped or suffering child would “disavow” the value of life or in any way suggest that the child is not entitled to the full measure of legal and nonlegal rights and privileges accorded to all members of society.

98 Wn.2d at 481, quoting *Turpin v. Sortini*, 31 Cal.3d 220, 233, 182 Cal. Rptr. 337, 348, 643 P.2d 954 (1982).

Valley and LabCorp provide no reason to overrule *Harbeson* even if this Court had “the authority to overrule a decision of the Supreme Court.” *Nielson v. Wolfkill Corp.*, 47 Wn. App. 352, 358, 734 P.2d 961 (1987). The Supreme Court itself has never retreated from *Harbeson* nor undermined it in any way. See *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 280, ¶22, 208 P.3d

1092 (2009) (where Court has expressed “a clear rule of law . . . we will not—and should not—overrule it sub silentio.”).

In *McKernan v. Aasheim*, 102 Wn.2d 411, 687 P.2d 850 (1984), the only Washington case cited by Valley and LabCorp in their argument that *Harbeson* has been *sub silentio* overruled, (LabCorp Br. 17-21; Valley Br. 29), the trial court merely refused to allow recovery of the routine living expenses incurred in raising a healthy child. While rejecting damages associated with the birth and life of a healthy child in a claim for “wrongful pregnancy,” the *McKernan* Court expressly allowed the parents to recover “damages for the expense, pain and suffering, and loss of consortium associated with the failed tubal ligation, pregnancy and childbirth.” 102 Wn.2d at 421. Here, the jury was instructed that the Wuths could not recover the costs of raising a healthy child – the damages at issue in *McKernan*. The *McKernan* decision had nothing to do with the bases for *Harbeson’s* holding – respect for reproductive choice and accountability for the consequences of technological advances in genetic testing. Given the technological advances these defendants utterly failed to utilize, as the Wuths properly trusted them to, these policy reasons for imposing tort liability are even more compelling today than when *Harbeson* was decided in 1983.

2. **Valley and LabCorp consented to the trial court's voir dire process and never objected to removal of jurors who would not agree to follow the court's instructions.** (Valley Arg. § C.2)

The trial court selected impartial jurors who would agree to follow the law established by *Harbeson*, asking voir dire questions that Valley and LabCorp proposed and removing only those jurors that Valley and LabCorp conceded were unqualified to sit. Valley and LabCorp did not object to the trial court's examination of jurors, did not object to the trial court's characterization of the Wuths' claim, and did not object to its (true) statement that the Wuths had the right to obtain an abortion. (Valley Br. 42-43) Valley and LabCorp waived their argument that the trial court engaged in an "intrusive and inflammatory" voir dire process (Valley Br. 40) to seat a "death-qualified" jury by not raising their objections below. *See State v. Perry*, 24 Wn.2d 764, 768-69, 167 P.2d 173 (1946) (requiring timely objection to preserve alleged error in empanelling jury), *cert denied*, 343 U.S. 911 (1952).

"Trial courts have discretion in determining how best to conduct voir dire," and a "responsibility to remove prospective jurors who will not be able to follow its instructions on the law." *State v. Davis*, 141 Wn.2d 798, 825-26, 10 P.3d 977 (2000). A trial

court's discretion extends to excusing particular jurors. *State v. Jorden*, 103 Wn. App. 221, 226, 11 P.3d 866 (2000), *rev. denied*, 143 Wn.2d 1015 (2001); Tegland, 4 *Wash. Prac.: Rules Practice* 161 (6th Ed. 2013). In this case, the trial court asked potential jurors in a short questionnaire whether they believed abortion is morally wrong or should be illegal, whether they had close contact with a disabled child, if they had been a party to medical negligence lawsuit and whether they knew any of the parties (CP 8710-11) – just as Valley and LabCorp requested.⁸ The trial court and counsel then examined any potential jurors who responded yes to *any* of the questions to determine whether those jurors could be impartial and follow the court's instructions. (CP 11963)

The trial court did not then seat a “death or abortion-qualified” jury, or disqualify potential jurors who had a “bias against abortion.” (Valley Br. 44) To the contrary, the trial court refused to strike jurors with strong pro-life beliefs:

⁸ (CP 4699: “the real question is whether a juror’s views on abortion would prevent him or her from fairly considering plaintiffs’ claims and the arguments of the defendants” (Valley); CP 4724 (Valley questionnaire); CP 4727: “the heart of the issue” is “[w]hether a juror holds beliefs on abortion that would make it such that he or she could not remain impartial” (LabCorp); CP 4738 (LabCorp questionnaire).

You can get a very fair trial from people who feel strongly that they would never do this, but that they are going to live up to their obligation to treat the plaintiffs fairly, . . .

. . . a pro choice jury is not something that I think plaintiffs can get or plaintiffs are entitled to.

(10/21 RP 211) For example, the trial court refused the Wuths' attempt to excuse for cause a juror who recognized that "the law being the law is greater than" her "deep seated" pro-life belief that "abortion is murder." (10/21 RP 202-03, 207-08)⁹

The trial court disqualified only those jurors who affirmatively stated they could not be impartial or could not follow its instructions *for any reason*, including those who were biased in favor of or against LabCorp, (10/21 RP 175), for or against Valley or other hospitals (10/22 a.m. RP 8-9; 10/22 p.m. RP 42-45, 99-106; 10/23 RP 188-89), or against medical malpractice plaintiffs or the tort system. (10/23 p.m. RP 95-98; 10/23 RP 174-75)¹⁰ Neither Valley nor LabCorp objected when the trial court dismissed jurors

⁹ Neither Valley nor LabCorp objected when the Wuths later used a preemptory challenge to strike that juror. (10/23 RP 210)

¹⁰ Valley now mischaracterizes it as a "rebuke" (Valley Br. 37), but Valley lodged no objection to the trial court's accurate statement during voir dire that the tort system fulfills society's expectation that "people . . . live up to a standard of care. . . . It doesn't mean that every mistake is something that results in a court case, but does mean that if people don't meet the standard of behavior, that someone who is injured by that is entitled to recover damages." (10/23 RP 163-64)

who affirmed that their beliefs prevented them from being impartial or from following the court's instructions. (*E.g.*, 10/21 RP 148; 10/22 a.m. RP 35, 55, 75-76; 10/22 p.m. RP 7-8, 23-24, 67-68, 73-74) Valley fails to identify a single instance in which the trial court refused to empanel a pro-life juror who "profess[ed] an ability to follow the law." (Valley Br. 42; *see also* Valley Br. 15; 1/24 RP 61-62)

Valley's other allegations of error in jury selection are equally meritless. The trial court correctly told jurors that the Wuths claimed damages caused by the defendants' negligence, which deprived them of information that would have led them to terminate the pregnancy (*See, e.g.*, 10/21 RP 215; 10/22 p.m. RP 14) – not that the jury would be deciding "the constitutionality of abortion." (Valley Br. 42)¹¹ And as Valley expressly acknowledged below that it was "not argu[ing] that the *jury pool* was not representative of the County," (CP 14137 (emphasis in original), RCW 2.36.080(1), the requirement that jury pools, not individuals,

¹¹ Based on an error in the verbatim report of proceedings attributing a statement of Wuths' counsel to the trial court, Valley also asserts that the trial court "laps[ed] into role play." (Valley Br. 43-44) The court reporter has filed a report of proceedings correcting that transcription error. (10/21 RP 205)

represent a “fair cross section of the population” (Valley Br. 44), has no application here.

3. The jury fulfilled its constitutional role by awarding damages consistent with established law and supported by substantial evidence.
(Valley Arg. § B.1)

Washington Constitution, Art. 1, § 21, guarantees the “inviolable” right to jury trial, including the determination of damages. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 645-48, 669, 771 P.2d 711, 780 P.2d 260 (1989). The trial court authorized the jury to award the Wuths those damages approved by *Harbeson* and no more – “the extraordinary expenses to be incurred during the child’s lifetime, as a result of the child’s congenital defect” and “mental anguish and emotional stress suffered by the parents during [the] child’s life.” 98 Wn.2d at 477, 479-80. (CP 2248, 11619) The jury fulfilled its constitutional role in awarding the extraordinary expenses that Oliver will incur over his remaining 70-year life expectancy and awarding Rhea and Brock compensation for their profound emotional distress.

In reviewing the jury’s award of damages, this Court must view the evidence in the light most favorable to the Wuths and affirm the award “unless it is outside the range of substantial

evidence in the record, or shocks the conscience of the court, or appears to have been arrived at as the result of passion or prejudice.” *Collins v. Clark County Fire Dist. No. 5*, 155 Wn. App. 48, 82, ¶ 76, 231 P.3d 1211 (2010) (internal quotation removed). This Court’s review of the jury’s award of damages “is most narrow and restrained . . .” *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 330, 858 P.2d 1054 (1993). Where, as here, the trial court rejects defendants’ challenge to the jury’s damages award, the trial court’s decision strengthens the verdict on review by the appellate court. *Fisons*, 122 Wn.2d at 330.

- a. The trial court properly refused to remit the jury’s reasoned and reasonable award of damages to compensate Oliver for a lifetime of medical expenses.**
(Valley Arg. § B.3)

Neither Valley nor LabCorp dispute that Oliver will require a lifetime of extraordinary medical care – precisely the damages authorized by *Harbeson*. As the Wuths established the undisputed fact of damage, Valley’s argument that the jury was limited to the amount suggested by counsel in closing argument or to an expert’s conservative calculations flips the governing standard of review on its head and ignores the substantial evidence that, as the trial court found in denying the post-trial verdict (1/24 RP 63), established

with reasonable certainty the additional costs for Oliver's extraordinary medical expenses over his remaining 70-year life expectancy.

“[O]nce the [plaintiff] establishes the *fact* of loss with certainty (by a preponderance of the evidence), uncertainty regarding the *amount* of loss will not prevent recovery.” *Lewis River Golf, Inc. v. O.M. Scott & Sons*, 120 Wn.2d 712, 717, 845 P.2d 987 (1993) (emphasis in original; quotation omitted). “Compensatory damages are often at best approximate: they have to be proved with whatever definiteness and accuracy the facts permit, but no more.” *Lewis River*, 120 Wn.2d at 718 (quotation omitted). As the trial court instructed the jury, *without exception*, in response to a question during deliberations, the jury is bound by “the instructions . . . and the evidence.” (CP 11721-22) The jury is not limited in its damages award to the amount suggested by counsel in final argument. *Allstate Ins. Co. v. Wiley*, 954 So.2d 1273, 1275 (Fla. App. 2007) (reversing remittitur of future medical expenses).

The jury necessarily rejected Valley's factual claim that Oliver could be adequately cared for in a group home setting where several residents would be jointly supervised, and that providing

Oliver one-on-one attendant care for the rest of his life was unwarranted “premium private care.” (*Compare Valley Br. 36 with RP 1974-75, 1983, 1990-91, 2042, 2431, 2454*)¹² The Wuths’ experts presented a life care plan using a “conservative” range of future care costs that did not include additional expenses for the medical care Oliver is likely to require, such as treatment for seizures, falls, emergency room visits, and orthopedic treatment. (RP 1985, 2181, 2415-16, 3532) That Valley’s damages expert disagreed is not grounds for reversing the jury’s damage award. *Kohfeld v. United Pacific Ins. Co.*, 85 Wn. App. 34, 43, 931 P.2d 911 (1997).

In refusing to remit the jury’s verdict, the trial court noted that the Wuths’ expert testified that the care plan could not possibly “include all of the components of . . . the extraordinary care [Oliver] requires because of his disability.” (1/24 RP 63-64) Oliver is likely to develop a seizure disorder that will require treatment. (RP 1957, 1985-86) Oliver will be at a high risk of falls for the rest of his life and will likely require ER visits; these expenses will be incurred with “reasonable medical probability.” (RP 1986-87) As an adult,

¹² The Wuths’ experts testified “with reasonable medical probability” that Oliver would require an attendant who has the “capacity to provide one-on-one individualized attention,” 24-hour attendant care, and “individualized support” at night. (RP 1975, 2042, 2454, 2564-66) Valley mischaracterizes this testimony as “speculation.” (Valley Br. 35)

Oliver risks injuring himself on a daily basis with sharp implements or through other naturally dangerous conditions. (RP 1979-80) Dr. Glass, the Wuths' neurologist, also testified on a more probable than not medical basis that Oliver will likely benefit from future medical advances that will require additional funds. (RP 1987)

The jury was entitled to find that Oliver is likely to incur additional expenses over his 70-year remaining life expectancy that were not included in the conservative \$23,675,000 life care plan. The jury awarded an additional \$1,325,000 because it found that "future medical expenses [are] reasonably certain to be incurred." *Erdman v. Lower Yakima Valley, Washington Lodge No. 2112 of B.P.O.E.*, 41 Wn. App. 197, 208, 704 P.2d 150 (1985) (Valley Br. 33) (reversing trial court's order setting aside damages verdict; jury was at "liberty" to award future medical expenses "when it was also shown that [plaintiff] would suffer in the future"). This Court should affirm the trial court's refusal to remit the jury's reasoned award of damages to compensate Oliver for a lifetime of extraordinary expenses.

b. This Court cannot substitute its judgment for the jury's award of emotional distress damages expressly authorized by *Harbeson*. (Valley Arg. § B.2; LabCorp Arg. § B.1)

The trial court also did not abuse its discretion in refusing to remit the jury's award of general damages. *Harbeson* fully supports the jury's award of non-economic damages to the Wuths for their "mental anguish and emotional stress" resulting from Oliver's condition. *Harbeson*, 98 Wn.2d at 477.

The Supreme Court has rejected Valley's argument that medical malpractice plaintiffs like the Wuths are barred from recovering *any* emotional distress damages in the absence of "objective symptomology." (Valley Br. 29) "[T]he objective symptom requirement is not necessary to prove emotional distress damages under RCW chapter 7.70." *Berger v. Sonneland*, 144 Wn.2d 91, 113, 26 P.3d 257 (2001). *See Schmidt v. Coogan*, ___ Wn.2d ___, ¶27, 335 P.3d 424, 431 (2014) (claim under RCW ch. 7.70 among the statutory claims for which emotional distress damages available in the absence of objective symptomology).

The Wuths' statutory claim was not for common law "bystander injury" or for negligent infliction of emotional distress, in which the Court has required objective symptomology as a

limiting tool, “as corroborating evidence to fend off fraudulent claims.” *Hegel v. McMahon*, 136 Wn.2d 122, 133, 960 P.2d 424 (1998); *Berger*, 144 Wn.2d at 113. The Wuths sued under RCW ch. 7.70 for “injury arising from health care”— woefully inadequate health care that began when Valley negligently scheduled an appointment to take a sample from Rhea’s placenta for genetic testing. Valley’s argument that emotional distress damages are unavailable after such a grievous invasion of its patient’s intimate and personal interests only illustrates the wisdom of the *Harberson* Court’s holding “— without requiring physical impact or objective symptomatology — ‘that recovery may include . . . damages for the parents’ emotional injury caused by the birth of the defective child.’” *Price v. State*, 114 Wn. App. 65, 72, 57 P.3d 639 (2002) (emphasis in original), quoting *Harberson*, 98 Wn.2d at 475.

Valley fails to cite any of this controlling authority, instead relying on a products liability case that itself recognized that recovery for emotional distress is appropriate when a defendant violates “emotionally laden personal interests” such as the parent-child bond “and emotional distress was an expected result of the objectionable conduct.” *Bylsma v. Burger King Corp.*, 176 Wn.2d 555, 561, ¶ 10, 293 P.3d 1168 (2013) (Valley Br. 31); see also

Schmidt, 335 P.3d at 430, ¶24 (“plaintiff in a legal malpractice case may recover emotional distress damages when significant emotional distress is foreseeable from the sensitive or personal nature of representation or when the attorney’s conduct is particularly egregious”) (Wiggins, J., plurality).

Valley dismisses the jury’s constitutional role by seeking de novo review of the extent of the Wuths’ emotional distress.¹³ But the “jury’s role in determining noneconomic damages is perhaps even more essential” than its constitutional role in determining other questions of fact. *Bunch v. King County Dep’t of Youth Servs.*, 155 Wn.2d 165, 179-80, ¶24, 116 P.3d 381 (2005), quoting *Sofie*, 112 Wn.2d at 654. The jury and then the trial court definitively rejected LabCorp’s argument that the emotional benefits the Wuths receive from parenting Oliver entirely offset their injury (LabCorp Br. 19-20) as well as Valley’s absurd assertion that the Wuths did not offer a “shred of evidence” of their emotional distress. (Valley Br. 30)

¹³ As the trial court noted, the one-to-one ratio of general and special damages is well within the expected range of tort damages. (1/24 RP 65) See Kritzer, *Advocacy and Rhetoric vs. Scholarship and Evidence in the Debate Over Contingency Fees: A Reply to Professor Brickman*, 82 Wash. U. L. Q. 477, 492-93 (2004).

The trial court judge heard the emotionally-laden testimony firsthand. She flatly rejected LabCorp's and Valley's challenge to the verdict, finding that "the pain and suffering over and above the joy and love that parents feel about a disabled child . . . is a pain . . . that is almost unbearable to witness . . . the pain that will last as long as Oliver is alive . . . an ongoing grief that this loving, happy little boy, is trapped inside such a disabled body and mind:"

[The Wuths] knew they didn't want to have a disabled child who had the same abnormality that Mr. Wuth carried, and so they just did everything that they were supposed to do.

They went to their doctor, they went to Valley, they went to Dr. Harding, they brought all their information, they were timely, they were prepared, they followed up, and they prepared the way, with joy, for Oliver . . . And then they gave birth to a child who, from the moment that, as Mrs. Wuth said, as she looked into his eyes, she knew much was wrong, much was missing, and then they began the task of raising Oliver.

Of course they love him. . . . [RP 1434-36, 1442-46, 1479-81, *see* RP 2377-78, 2784-85] . . .

...

But the pain that comes with raising Oliver was also apparent in really almost every word these plaintiffs spoke when they were on the stand, and in the video and photographic evidence that we saw here. [Exs. 7, 8, 9; RP 1458-61, 1905-06, 2784-85]

...

I heard a father who loves his son, is protective of his son . . . very sadly telling us that, in fact, the pain and suffering of watching Oliver be his son outweighs his

love and happiness at having Oliver in his life. It's a terrible admission . . . for a father to make. [RP 2839]

...

This is a pain that will last as long as Oliver is alive. . . . It's an ongoing grief that this loving, happy little boy is trapped inside such a disabled body and mind, and all that was needed to prevent that from happening was an accurate lab test. [RP 1722-30, 2785-86, 2798-2800; *see also* RP 1490-94]

(1/24 RP 68-71) (supporting citations added)

The trial court found that the Wuths' "pain has been implicit in all of the evidence that we heard from the plaintiffs, and I guess you had to be here to see it, like me and the jury. But that's why this is such a high award." (1/24 RP 71) This Court cannot second guess the trial court's decision or the evidentiary basis supporting the jury's verdict, no matter how "limited" that evidence may appear to appellants when viewed in a cold record. *Bunch*, 155 Wn.2d at 179, ¶¶ 23-24.

4. Evidence concerning Brock's cousin's condition was relevant to both proximate cause and damages. (Valley Arg. § C.3)

The trial court did not abuse its discretion in admitting evidence that Brock's cousin Jackie and his aunt Patsy suffered from serious disabilities as a result of the translocation for which he and Rhea sought testing. Valley conceded that the condition of Brock's relatives bore directly on causation and damages, and the

trial court repeatedly gave the jury a limiting instruction regarding this evidence, carefully evaluating the prejudicial nature of the evidence and taking appropriate steps to minimize it. (RP 282, 1064, 1488, 1922, 2220, 2509, 2698, 2781) *See Jenkins v. Snohomish County PUD No. 1*, 105 Wn.2d 99, 107, 713 P.2d 79 (1986).

Jackie's condition and her genetic testing is what led Brock and Rhea to Valley's Maternal-Fetal Medicine Clinic. Valley now argues that it was "uncontested" that "the Wuths would have terminated the pregnancy" had Valley and LabCorp provided accurate information, while at the same time conceding that no defendant stipulated to causation. (Valley Br. 45-46) (*see* 10/22 RP 21) Both LabCorp and Valley in fact vigorously contested this element of the Wuths' case below, successfully opposing the Wuths' motion for summary judgment on the issue of causation (CP 13384-86) and making the Wuths "prove" at trial that they would have terminated the pregnancy had they been told the fetus had the same genetic defect as Brock's cousin Jackie. (*e.g.*, RP 1389-90, 1747-53)

Valley also utterly fails to address the fact that the Wuths' knowledge of Jackie's condition exacerbated their emotional distress and anxiety that their son will develop Jackie's obesity, anti-social behavior, or seizures. (RP 1729-30, 2782-88) Valley

cherry picks from its cross-examination of the Wuths' neurologist Dr. Glass to argue that because Jackie's condition is not "predictive," evidence of her disabilities was not relevant. (Valley Br. 45 citing RP 1922) Valley ignores that its own neurologist agreed with Dr. Glass that Jackie, the only living person sharing this particular unbalanced translocation, is a relevant "data point" for any expert to consider in reflecting on Oliver's prognosis. (RP 1934; see RP 1550, 1591, 4035)

5. **The trial court did not abuse its discretion in instructing, as LabCorp asked, that the jury could not award damages to deter the defendants or to "send a message."** (LabCorp Arg. § D.2; Valley Arg. § C.1)

The trial court allowed counsel to argue that policies of compensation and deterrence underlie our system of tort law, but instructed the jury, *with Valley's and LabCorp's approval*, that the only "purpose of damages is to compensate," and that it is "not appropriate . . . to award damages . . . to deter these specific defendants or to send some sort of message." (RP 5388) This distinction is not erroneous, the Wuths' counsel never "argue[d] for 'deterrence damages'" (Valley Br. 15), and the trial court's instruction cured any possible prejudice to the defense. The trial

court acted well within its discretion in denying a new trial on this basis. (1/24 RP 50-52)

“[D]eterring negligence and compensating for injury” are the “underlying principles” of tort law. *Mohr v. Grantham*, 172 Wn.2d 844, 856, ¶20, 262 P.3d 490 (2011). An accurate statement about the policy underlying tort law is not improper argument. *See Miller v. Kenny*, 180 Wn. App. 772, 817, ¶109, 325 P.3d 278 (2014) (“appeal[] to the jurors’ interest as members of the public to ‘protect the public interest’ and to enforce the public ‘compact’ that insurance companies have under the law . . . is not improper argument in a[n insurance] bad faith case.”). The trial court repeatedly prohibited any argument for punitive damages, or that damages be sufficient to “send a message” to Valley and LabCorp. (RP 198-99, 5254-55; 1/24 RP 51-52) The Wuths’ counsel obeyed this restriction in arguing that the tort system holds defendants accountable for two reasons – compensation and deterrence. “Deterrence is not punishment.” (RP 5257)

The trial court sustained LabCorp’s objection when the Wuths’ counsel mentioned deterrence in discussing damages. (RP 5308) After *Dr. Harding’s* counsel stated that the “purpose of damages, for compensation and deterrence . . . do not apply to Dr.

Harding” (RP 5381), LabCorp asked for a curative instruction, not a mistrial. (RP 5383) The trial court then gave the curative instruction that LabCorp requested (RP 5385) – that “the purpose of damages . . . is to compensate” and that it is “not appropriate to award damages in this case to deter specific defendants or to send some sort of message.” (RP 5389) Valley cannot now complain because it never objected to the instruction its co-defendant LabCorp sought. Nor can LabCorp or Valley overcome the strong presumption that the jury followed the court’s instruction. *Carnation Co., Inc. v. Hill*, 115 Wn.2d 184, 186-87, 796 P.2d 416 (1990).

This Court “generally upholds [the] trial court decision[.]” on a motion for a new trial, in recognition of the trial court’s favored position to determine within the context of the entire trial whether counsel engaged in misconduct and whether any misconduct so severely prejudiced the opposing party as to warrant a new trial. *ALCOA v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 539, 998 P.2d 856 (2000). The trial court did not abuse its discretion in rejecting the defense argument that the jury’s verdict was driven by an improper appeal to deterrence or punishment. (1/24 RP 51-52)

B. A properly instructed jury found Valley directly liable based on overwhelming evidence of institutional negligence and vicariously liable for its staff's negligence in failing to send LabCorp information identifying Brock's chromosomal abnormality. (Valley Arg. § A)

A hospital, as well as the health care providers who are its agents, owe a duty of reasonable care to patients. The jury heard overwhelming evidence that Valley violated the standard of care of a hospital operating a maternal-fetal medicine clinic and that its individual agents failed to meet professional standards of care. The trial court neither allowed "novel" theories of liability nor allowed the jury to "infer" Valley's negligence. (Valley Br. 1, 21)

1. The jury found Valley both directly liable for its corporate negligence and vicariously liable for the negligence of its agents in an undifferentiated verdict on six different grounds, any one of which supports the judgment against Valley.

This Court need not address Valley's challenge to the doctrine of corporate negligence because the jury, in an undifferentiated verdict, found Valley negligent in any or all of six different ways, any one of which is sufficient to support the judgment. (CP 11607, 11719-20) Valley did not "propose a special verdict form that would have clarified on what grounds the jury rested its verdict," and it therefore "cannot gain a new trial merely

by showing that at least one of [plaintiff's] claims fails . . .” *Collings v. City First Mortgage Servs., LLC*, 177 Wn. App. 908, 925, ¶36, 317 P.3d 1047 (2013), *rev. denied*, 179 Wn.2d 1028 (2014).¹⁴ Where a jury’s verdict does not differentiate among multiple theories of liability, this Court must affirm if there is substantial evidence to support *any* of them.

To preserve the alleged error on appeal, a defendant challenging fewer than all of the theories of liability the jury considered must propose a special verdict that segregates challenged theories from those that the defendant concedes properly went to the jury. *See Davis v. Microsoft Corp.*, 149 Wn.2d 521, 539-40, 70 P.3d 126 (2003); Tegland, 15A *Wash. Prac.: Handbook on Civil Procedure* § 88.6 (2014-15 Ed.). Valley’s proposed verdict form asked only “Was Valley Medical Center negligent?” (CP 5791) In an early conference on instructions, the trial court stated its preference for a “detailed” special verdict form

¹⁴ *Accord, McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 11, 882 P.2d 157 (1994) (where defendant conceded warning claim properly before jury, court may affirm where verdict form failed to distinguish between liability for negligent design and failure to warn); *Wlasiuk v. Whirlpool Corp.*, 81 Wn. App. 163, 173, 914 P.2d 102 (1996), *modified by* 932 P.2d 1266 (1997) (where verdict form did not require jury to specify which sections of employee handbook contained enforceable promises of employer, court may affirm “if we find substantial evidence of a breach of any promise of specific conduct”).

with “specific” questions. (RP 1357) The closest Valley came to proposing such a special verdict was its suggestion in conference that the verdict form contain one line for corporate negligence and another for vicarious liability. (RP 2760) But Valley never proposed having the jury differentiate among the six distinct theories of liability in Instruction No. 6.

Valley’s argument on appeal that the trial court erred in allowing the jury “to impose liability on Valley without regard to whether or not its individual health care providers satisfied the standard of care” (Valley Br. 25) ignores its unchallenged vicarious liability for medical assistant Shelton’s failure to send Brock’s genetic test report to LabCorp. (CP 11607) Valley never proposed a special verdict directing the jury to answer what it now calls “‘the big question’ of whether Ms. Shelton deviated from the standard of care.” (Valley Br. 22) And the Wuths proved each of three separate claims of corporate negligence, as well as three separate claims that “specific hospital employees and agents actually breached the standard of care” (Valley Br. 23), under unchallenged instructions that did not allow the jury to “infer” negligence but required the Wuths to prove that Valley’s “officers, employees, and agents [failed to] exercise the degree of skill, care, and learning expected of

reasonably prudent officers, employees or agents of . . . hospitals in the State of Washington. . .” (CP 11614) This Court should reject Valley’s corporate negligence challenge because it was not preserved below.

2. The trial court correctly held that Valley owed its patients a duty to exercise reasonable care to provide adequate staffing, training and supervision of its employees. (Valley Arg. § A.1)

A hospital owes a duty of care to its patients and is liable for its own negligence. *Pedroza v. Bryant*, 101 Wn.2d 226, 233, 677 P.2d 166 (1984). The trial court correctly denied Valley’s motion for judgment as a matter of law and correctly instructed the jury on corporate negligence. (CP 11615, 14212-13; 1/17 RP 25-34) If it reaches this unpreserved issue, this Court should reject Valley’s attempt to eviscerate its duty to make institutional decisions with due regard for patient care.

The doctrine of corporate negligence reflects a policy of institutional accountability. “[A] hospital owes an independent duty of care to its patients directly.” *Pedroza*, 101 Wn.2d at 232. This independent duty is “nondelegable.” *Pedroza*, 101 Wn.2d at 229. Corporate negligence is distinct from a hospital’s vicarious liability for the negligence of its actual and apparent agents.

Schoening v. Grays Harbor Cmty. Hosp., 40 Wn. App. 331, 334, 698 P.2d 593, *rev. denied*, 104 Wn.2d 1008 (1985); WPI 105.02.02.

The Legislature has imposed upon hospitals duties in addition to and separate from an “individual officer, director, employee or agent thereof,” RCW 7.70.020, requiring hospitals follow the “accepted standard of care.” RCW 7.70.030. Valley’s argument that corporate liability is limited to negligent credentialing is meritless. RCW ch. 7.70 does not limit a hospital’s duty to any perceived “statutory gap” arising from the independent contractor status of credentialed physicians. (Valley Br. 17-18) That the jury found Dr. Harding complied with the standard of care in his treatment of Rhea Wuth does not defeat Valley’s liability for its own institutional negligence. (Valley Br. 19-21)

Instruction No. 12 correctly told the jury that Valley had a duty to adequately staff its Maternal-Fetal Medicine Clinic, to train staff on the Clinic’s policies and practices, and to adopt policies that would protect its patients:

A hospital owes an independent duty of care to its patients. This includes the duty to:

1. Exercise reasonable care to provide an adequate number and mix of staff to meet the care, treatment and service needs of the patients in its Maternal Fetal Medicine Clinic.

2. Exercise reasonable care to train employees to the applicable policies and practices of its Maternal-Fetal Medicine Clinic.
3. Exercise reasonable care to adopt policies and procedures for health care services provided to its patients at its Maternal Fetal Medicine Clinic.

(CP 11615) Valley argues that “a hospital’s corporate duties are limited” to those set forth in WPI 105.02.02 (Valley Br. 20), but ignores that the pattern instruction expressly recognizes that the duties it lists are “*examples.*” WPI 105.02.02, Note on Use, 6 *Wash. Pract.* 595 (6th Ed. 2012) (emphasis added). “The specific language of jury instructions is within the discretion of the trial court,” which has the discretion to “deviat[e] from the language of the Washington Pattern Jury Instructions.” *Humes v. Fritz Companies, Inc.*, 125 Wn. App. 477, 498-99, 105 P.3d 1000 (2005); see *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996) (“Whether to give a particular instruction to the jury is a matter within the discretion of the trial court.”).

The trial court’s instruction correctly stated a hospital’s duty of care to its patients under the standards of the Joint Commission on Accreditation of Health Organizations, which establish the standard of care for hospitals. *Pedroza*, 101 Wn.2d at 233-34; *Douglas v. Freeman*, 117 Wn.2d 242, 248, 814 P.2d 1160 (1991) (RP

661, 2287-88, 2308-09: expert testimony that JCAHO establishes national standards of care for hospitals; CP 7069: a hospital's standard of care "is defined by a combination of the JCAH standards, the hospital's own by-laws that are in accord with the JCAH, and statutes and regulations" (Valley trial brief). The JCAHO standards required Valley to provide "an adequate number and mix of staff to meet the care, treatment, and service needs of the patients" and to train its employees on "hospital wide policies and procedures . . . and relevant unit, setting, or program-specific policies and procedures." (CP 4036, 4043) *See, e.g., Douglas v. Freeman*, 117 Wn.2d at 250 (hospital violated its "duty to provide the necessary professional assistance" to an unlicensed resident who performed a tooth extraction).¹⁵

¹⁵ *See also Hall v. Episcopal Long Term Care*, 54 A.3d 381, 400 (Pa. Super. 2012) (nursing home liable for "chronic[] understaff[ing]"), *app. denied*, 620 Pa. 715 (2013); *Scampone v. Grane Healthcare Co.*, 11 A.3d 967, 976 (Pa. Super. 2010) (health care provider has a duty "to hire adequate staff to perform the functions necessary to properly administer to a patient's needs"), *aff'd in part on other grounds sub nom. Scampone v. Highland Park Care Ctr., LLC*, 618 Pa. 363, 57 A.3d 582 (2012); *Welsh v. Bulger*, 548 Pa. 504, 698 A.2d 581 (1997) (hospital could be liable for failing to staff qualified surgeon to intervene during baby delivery's if surgery became necessary); *Czubinsky v. Doctors Hosp.*, 139 Cal.App.3d 361, 367, 188 Cal.Rptr. 685, 688 (Cal. App. 1983) ("Failure of the hospital to provide adequate staff to assist the doctor in the immediate post-operative period was an act in dereliction of duty"); *Leavitt v. St. Tammany Parish Hosp.*, 396 So.2d 406, 408 (La. App. 1981) (hospital breached "duty to respond promptly to [patient]'s calls for help . . . by having less than adequate staff on hand").

Further, as Valley's own proposed instruction recognized, Valley had the duty to "exercise reasonable care to adopt policies and procedures for health care provided to its patients." (CP 5766) *Osborn v. Public Hospital Dist. 1, Grant County*, 80 Wn.2d 201, 205, 492 P.2d 1025 (1972); WPI 105.02.02. Valley "may not request an instruction and later complain on appeal that the requested instruction was given." *City of Seattle v. Patu*, 147 Wn.2d 717, 721, 58 P.3d 273 (2002) (quotation omitted).

Nothing in Instruction No. 12 required or even allowed the jury to "infer Valley's negligence." (Valley Br. 21) To the contrary, the trial court instructed the jury that the Wuths bore the burden of proving both Valley's breach of its duty of care and that Valley's negligence proximately caused their damages under pattern instructions. (CP 11610-12) Instruction No. 12 correctly stated the law of corporate negligence.

3. The Wuths established Valley's corporate negligence with overwhelming evidence, not "inferences." (Valley Arg. § A.2)

The Wuths proved Valley's negligence through overwhelming evidence, not "inferences." Despite a doubling of its revenue in 2007, Valley cut its genetic counselor coverage from three days to one day a week, far less than every other major

hospital with a maternal-fetal medicine clinic in Puget Sound. (RP 659-60, 4467)¹⁶ Valley then allowed its Clinic to operate without a manager for ten months, from May 2007 to February 2008. (RP 666-70, 909, 1082-85, 2294-96)

It is below the standard of care for a hospital to schedule CVS without genetic counseling. (RP 921, 924, 1081-82) Yet Valley scheduled Rhea Wuth for CVS on December 31 in direct violation of its policy to send patients referred for genetic counseling to Swedish if Valley did not have a genetic counselor available. (RP 647-48, 677, 833, 2305-06, 4470-71) Indeed, Valley's patient scheduler did not even know this policy existed because Valley failed to train her or inform her of it. (RP 685-87, 2306-08, 2312-14, 5194-96)

Had a genetic counselor been present for Rhea's CVS on December 31, the counselor would have not only provided critical information to the lab regarding Brock's translocation (RP 991-93, 4745-49), but also would have realized on January 8 that LabCorp had failed to look for it. (RP 650-52, 659) Valley's poorly designed chart did not make clear what information had been sent to LabCorp, exacerbating its "borrowed" genetic counselor's inability

¹⁶ The trial court instructed the jury, as Valley proposed (CP 5766), that "the degree of care actually practiced by hospitals is evidence of what is reasonably prudent." (CP 11615)

to determine that LabCorp did not look for the very condition for which the Wuths had sought testing. (RP 650)

Valley simply ignores this evidence in arguing that the trial court allowed the jury to impose liability on Valley “even if the jury believed Ms. Shelton in fact sent the Children’s report.” (Valley Br. 22-23) Valley’s “irrefutable pattern of management negligence,” and its “systemic failure at every level of the organization,” was the “root cause” of the Wuths’ injury. (RP 659, 2315) This direct evidence that Valley’s “specific acts of negligence” caused the Wuths’ damages left no need for “the jury to infer the Wuths’ injuries could have been avoided by the hypothetical addition of more hospital funding, staffing, training, or policies.” (Valley Br. 23)

4. Valley is vicariously liable for the negligence of its employees and agents, including its “borrowed” part-time genetic counselor.
(Valley Arg. § D)

The court also correctly held that Elizabeth Starkey, the Swedish employee who was working as a genetic counselor at Valley one day per week, was both Valley’s apparent agent and its borrowed servant. (CP 1111) A hospital is liable for the negligence of those it holds out as its agents, not just its employees. *Adamski v. Tacoma Gen. Hosp.*, 20 Wn. App. 98, 112, 579 P.2d 970 (1978);

see also Restatement (Second) Agency § 267 (1958). The court correctly applied the seven factors identified in *Adamski* and in WPI 105.02.03, 6 *Wash. Pract.* 602 (6th Ed. 2012), to an undisputed summary judgment record in holding that Valley held out genetic counselor Starkey as its apparent agent.

The Wuths' obstetrician referred the Wuths to Valley's Maternal-Fetal Medicine Clinic – and not to a specific physician or counselor – on a form provided by Valley. (CP 647, 664, 750, 761, 769) Valley scheduled an appointment for the Wuths at its Clinic, ordered genetic testing based on a CVS procedure performed at Valley, had the test results reported to Valley, and had Ms. Starkey relay the test results to the Wuths and their physician. (CP 751, 779-83, 793, 795)

Valley concedes that it sought Ms. Starkey's services and designated her Valley's genetic counselor to handle all counseling for Valley's Clinic while its regular counselor was on leave. (Valley Br. 47-48; CP 652-53, 977-80, 986) *See* WPI 105.02.03(2). The Wuths believed that Ms. Starkey was a Valley employee. (CP 648, 751) The genetic counseling provided by Ms. Starkey was an integral part of Valley's operation, as Valley advertised. (CP 660, 664) *See* WPI 105.02.03(3).

Valley authorized Ms. Starkey to report the test results to the Wuths as part of her work for Valley. (CP 653) Ms. Starkey told Rhea she “was calling from Valley” when she reported the test results to Rhea. (CP 751, 754) Her letters reporting a “normal male” fetus stated that “[a]ll of us at Maternal Fetal Medicine are pleased we could be of help” and identified Rhea as a *Valley* patient. (CP 973, 975) *See Hartman v. United Bank Card Inc.*, 2012 WL 4758052 at *7 (W.D. Wash. Oct. 4, 2012) (Valley Br. 49) (statements authorized by the principal can establish apparent agency).

Ms. Starkey was also Valley’s *actual* agent under the “borrowed servant” doctrine. *See Brown v. Labor Ready Northwest, Inc.*, 113 Wn. App. 643, 647, 649, 54 P.3d 166 (2002) (forklift operator employed by labor agency was a “borrowed servant” of lumberyard because the lumberyard “accepted and controlled the service that led to the [plaintiff’s] injury”), *rev. denied*, 149 Wn.2d 1011 (2003). Identifying Ms. Starkey as “the Swedish genetic counsellor on duty” (Valley Br. 48), Valley omits that Ms. Starkey was “on duty” *at Valley*, serving *Valley’s* patients, pursuant to an agreement that “Swedish shall provide *to Valley* a genetic counselor for coverage one day per week *at Valley* for hi risk OB genetic counseling services for *its [Valley’s]* OBX perinatologist

clinic.” (CP 977 (emphasis added)) The “Services Agreement” identifies “Valley and Swedish” as “independent contractors” – and does not even mention Ms. Starkey. (CP 979-80)

“The question is the control of the borrowed servant by the borrowing employer for the transaction causing injury.” *Brown*, 113 Wn. App. at 651. Here, as in *Brown*, Ms. Starkey “was not sent to perform a single specific transaction at the behest of [her] general employer, but to do the work asked of h[er] by” Valley, *i.e.*, provide genetic counseling for its patients while its regular counselor was on leave. 113 Wn. App. at 651. Valley, not Swedish, scheduled Ms. Starkey’s patients (CP 653) and maintained the records Ms. Starkey used at Valley. (CP 795, 978) Valley is vicariously liable for its genetic counselor’s negligence in failing to discover that LabCorp had not looked for the very genetic defect that was the reason the Wuths sought genetic testing at Valley’s Maternal-Fetal Medicine Clinic.

5. Valley’s finances bore directly on its claimed budgetary excuses for not hiring a full-time genetic counselor. (Valley Arg. § A.3)

The trial court did not abuse its discretion in admitting limited evidence of Valley’s financial condition. Valley cited financial concerns as a reason for failing to hire a full time genetic

counselor or manager for its Maternal-Fetal Medicine Clinic. (RP 4425, 4489) Yet the Clinic's revenue went from \$1.3 million in 2006 to close to \$3 million in 2007, while costs – including expenses for hiring staff to care for patients at the Clinic – were well below the budgeted amount. (RP 662-66, 2298-2303; Ex. 32) Valley's expert conceded that the Clinic's growth, both in revenue and patient volume, is a valid factor in determining whether a hospital meets its duty under JCAHO guidelines to provide adequate staff. (RP 4617-18, 4641; *see* RP 661-63) The trial court carefully exercised its discretion, excluding evidence of Valley administrators' salaries and bonuses. (RP 351; CP 11748) The limited evidence of Valley's finances while it failed to fully staff its Clinic was relevant and not overly prejudicial.¹⁷

6. The trial court did not err in preventing Valley from introducing new testimony not provided in discovery by its CR 30(b)(6) witness. (Valley Arg. § A.3)

Civil Rule 30(b)(6) authorizes a corporation to designate a witness with the authority to “testify as to matters known or reasonably available to organization.” The trial court followed the

¹⁷ Valley did not claim the Wuths violated the order in limine or object at trial to the testimony it complains of on appeal. (Valley Br. 26) Valley does not explain how it was prejudiced by the Wuths' closing argument that Valley put “the business of medicine” ahead of “the practice of medicine” (RP 5308), and did not object to this argument at trial.

letter and the purpose of CR 30(b)(6) in entering its order in limine (CP 10815) to prevent surprise testimony at trial as a “basic discovery issue” (10/21 RP 25), and instructing the jury that the testimony of a person designated to speak for Valley controls over the testimony of other witnesses.

Valley designated 30(b)(6) witnesses to address (1) its efforts to hire genetic counselors (Vicki Binns), and (2) its scheduling of Rhea Wuth on a day when no genetic counselor was available (Linda Graham). (CP 9043-44, 9047-48, 9099) Addressing a concern that defendants would offer “evidence . . . that won’t be heard about until the day of trial, when it should have been” disclosed in discovery (10/21 RP 25), the trial court entered an order in limine precluding new testimony on a designated subject by non-designees. (CP 10815) That discovery order was not an abuse of discretion. *See Casper v. Esteb. Enterprises, Inc.*, 119 Wn. App. 759, 768, 82 P.3d 1223 (2004) (affirming exclusion of undisclosed testimony by designee as discovery sanction).

Valley violated the order in limine, eliciting testimony by a non-designee that contradicted its designated witness’ testimony that Valley, and not the perinatologist, was responsible for scheduling patients with genetic counselors. (RP 1345, 1367; CP

9012-14, 9021-22) The trial court committed no error by alleviating the prejudice from this misconduct by instructing the jury, *with no objection from Valley*, that the testimony of Valley's designated witnesses controlled over that of other Valley employees and agents. (RP 2357, 2692)

Valley cites no place in a 6,000 page verbatim report where the trial court prohibited Valley's designees from explaining, supplementing, or even altering their prior answers. Nor does Valley state what other testimony its designees or any other witness would have offered at trial. *See Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 26-27, 864 P.2d 921 (1993) (offer of proof is "critical for the purpose of creating an adequate record for review.")¹⁸ There is no basis for reversal in the trial court holding Valley to its designated CR 30(b)(6) representatives' testimony.

¹⁸ Valley's contention that the trial court gave extra "latitude" to the Wuths' witnesses to "deviate" from their deposition testimony is meritless. (Valley Br. 26-27) For instance, when the Wuths' expert perinatologist criticized Valley's hospital management, the trial court sustained Valley's objection and, *as Valley requested*, instructed the jury that the Wuths' perinatology expert was not qualified to testify to the standard of care of a hospital. (RP 2502-05: "you came to sidebar, you got the remedy you asked for at sidebar. . ."; RP 1086, 1092-93, 1114-17, 2510-11)

C. The trial court properly refused to allow LabCorp to allocate fault to Dr. Harding without affirmatively pleading such a claim and supporting it by competent expert testimony.

The trial court properly refused to allow LabCorp to “insert new malpractice claims in a case as part of [its] defense when the plaintiff is not bringing them.” (RP 1882) The trial court repeatedly, and correctly, refused to allow the jury to consider any allegations of fault against Dr. Harding that was not supported by competent expert testimony in depositions taken long before the Wuths and Dr. Harding entered into a non-collusive high-low agreement. The trial court correctly submitted to the jury the only allegation of fault that the evidence supported: that Dr. Harding was negligent if he failed to direct Valley’s medical assistant Shelton to send Brock’s genetic testing report to LabCorp. (RP 1879-92, 2677, 5207, 5248; CP 11958-59)

1. LabCorp failed to plead or prove any allocation of fault to Dr. Harding. (LabCorp Arg. §§ C.1, C.2)

LabCorp waived its belated attempt on appeal to allocate fault to Dr. Harding under RCW 4.22.070 (LabCorp Br. 26) by failing to plead that theory as a cross claim or affirmative defense

under CR 8(c). RCW 4.22.070 is not “self-executing” and “does not automatically apply to whenever more than one entity could theoretically be at fault.” See *Dormaier v. Columbia Basin Anesthesia, P.L.L.C.*, 177 Wn. App. 828, 858, ¶ 48, 313 P.3d 431 (2013); see also CR 12(i); *Adcox*, 123 Wn.2d at 25. LabCorp failed to invoke RCW 4.22.070 as to *Dr. Harding* by vaguely alleging in its Answer that “[t]he 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 liable.” (CP 2236)

Further, LabCorp’s allegations of fault were not supported by competent expert testimony from which the jury could find a breach of the standard of care and causation. See *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 228, 770 P.2d 182 (1989). A defendant that, as here, fails to present evidence supporting a claim of another’s fault is not entitled to an instruction seeking to allocate fault under RCW 4.22.070:

Either the plaintiff or the defendant must present evidence of another entity’s fault to invoke the statute’s allocation procedure. Without a claim that more than one party is at fault, *and sufficient evidence to support that claim*, the trial judge cannot submit the issue of allocation to the jury. Indeed, it would be improper for the judge to allow the jury to allocate fault without such evidence.

Adcox, 123 Wn.2d at 25 (emphasis added) (defendant hospital “failed to claim its right to allocation” because it did not produce any evidence of fault on the part of its two co-defendant doctors).

2. The trial court properly excluded LabCorp’s expert under ER 702 and 703 because he was unqualified and lacked a factual basis for his opinions, and not because of “procedural irregularities.”

The trial court exercised its discretion to exclude LabCorp’s expert Dr. London not as a result of “procedural irregularities,” as LabCorp asserts (LabCorp Br. 9, 25, 29-32), but because the 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. For similar reasons, the trial court properly exercised its discretion in refusing to allow LabCorp to rely on the Wuths’ geneticist to establish the standard of care of a perinatologist.

a. The parties thoroughly briefed Dr. London’s qualifications; there was no “procedural irregularity.” (LabCorp Arg. § C.3.a)

LabCorp had plenty of notice and was repeatedly heard on the issue of its gynecologist Dr. London’s lack of qualifications to testify to the standard of care of a perinatologist with respect to

genetic testing. Dr. Harding sought to exclude Dr. London from testifying well before Judge McCullough, at the defendants' request, continued the original April 8, 2013 trial date while Valley (unsuccessfully) sought discretionary review of the court's denial of Valley's motion to dismiss for failure to comply with the pre-filing notice of claim statute. (CP 14281, 14290)] Dr. Harding then argued in his June 2013 motion for summary judgment that no competent expert testimony supported anything but the Wuths' claim that Dr. Harding breached a duty if he failed to ask Valley's medical assistant to send Brock's genetic test report to LabCorp. (CP 2604) The Wuths' experts¹⁹ gave them no basis to oppose the motion. (7/18 RP 4)²⁰

When LabCorp relied upon Dr. London and plaintiffs' geneticist Dr. Clark to oppose summary judgment, Dr. Harding argued that neither had the qualifications to establish the standard of care for a perinatologist working with genetic counselors. (CP

¹⁹ One of the Wuths' experts, Dr. Blake, believed that Dr. Harding could be responsible for Cathy Shelton's actions as the "captain of the ship," but Judge McCullough had dismissed that theory on summary judgment in April 2013. (CP 2475) Neither Valley nor LabCorp has challenged that partial summary judgment on appeal. RAP 10.3(a)(4), (6).

²⁰ The motion for summary judgment was noted three months *before*, not "after the Wuth family agreed to settle claims against Dr. Harding," contrary to LabCorp's assertion. (LabCorp Br. 27) See Arg. § C.4, *infra*.

2907-10, 2915) LabCorp addressed Dr. Clark in opposing Dr. Harding's motion to strike, but made no attempt to support Dr. London's qualifications. (CP 3083-85)

After hearing argument, Judge McCullough found that Dr. London "doesn't have anywhere near the expertise that would be needed in this specific case." (7/18 RP 46; CP 3141) In excluding Dr. London "for now" in his summary judgment order, Judge McCullough did not permit LabCorp to resurrect Dr. London as a trial witness, as LabCorp suggests. (LabCorp Br. 31) Instead, Judge McCullough allowed LabCorp to further brief Dr. London's competence as an expert witness on reconsideration. (7/18 RP 48) LabCorp moved for reconsideration (CP 3151-52), but then let the discovery deadline pass, six weeks later, without designating a new expert. (CP 14290)

Because LabCorp had no competent evidence to support an allegation of fault, Dr. Harding renewed his motions in limine while the motion for reconsideration was pending, giving LabCorp yet another opportunity to brief the issue. (CP 6356-62, 7494-96) Judge McCullough denied reconsideration (CP 6383-85), and the trial court excluded Dr. London at trial. (CP 11752)

LabCorp repeatedly recognized below that Judge McCullough had excluded Dr. London from testifying *at trial*, not just “for summary judgment purposes,” as it now asserts on appeal.²¹ (LabCorp Br. 31) LabCorp’s counsel correctly informed the trial court that “Dr. London was excluded by Judge McCullough” (*compare* LabCorp Br. 32 *with* RP 3468), not because of “procedural irregularities,” but because Dr. London was unqualified. The trial court did not abuse its discretion in entering its order in limine (CP 10751; 10/23 RP 23-24), or in rejecting LabCorp’s subsequent offer of proof based on Dr. London’s reworked opinions during trial, rather than on the deposition testimony he gave in discovery. (RP 5207-08; CP 10991-11000)

b. The court did not abuse its discretion in finding Dr. London unqualified under ER 702 and ER 703. (LabCorp Arg. § C.3.b)

“[T]rial courts are given broad discretion to determine the circumstances under which expert testimony will be allowed.” *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, ¶16, 333 P.3d 388

²¹ *Compare* LabCorp Br. 31, 34 n. 39 *with* CP 3143 asking court “to reconsider its ruling striking the testimony of LabCorp’s expert Dr. London and precluding him from offering opinions *at trial*” (emphasis added), 3144, 3151, 7494: “LabCorp acknowledges Judge McCullough’s ruling disqualifying Dr. London from testifying *at trial*.” (emphasis added)

(2014). Dr. London had never practiced in Dr. Harding’s board-certified specialty of maternal-fetal medicine, never performed the perinatal procedures that Dr. Harding performed, and never worked in a clinic with genetic counselors. The trial court did not abuse its discretion in finding Dr. London unqualified to testify to Dr. Harding’s “fact specific” breach of the standard of care of a perinatologist under ER 702. Tegland, 5B *Wash. Prac.: Evidence* § 702.7 (5th Ed. 2007).

A witness may offer expert testimony only if “qualified as an expert by knowledge, skill, experience, training, or education.” ER 702. Experts may not opine on matters outside their expertise, and “must stay within the area of [their] expertise.” *Queen City Farms, Inc. v. Central Nat. Ins. Co. of Omaha*, 126 Wn.2d 50, 102, 882 P.2d 703, 891 P.2d 718 (1994). “What is or is not standard practice and treatment in a particular case, or whether the conduct of the physician measures up to the standard is a question for experts and can be established only by their testimony.” *Young*, 112 Wn.2d at 228 (quotation omitted). A medical degree does not automatically “bestow[] the right to testify on the technical standard of care; a physician must demonstrate that he or she has sufficient expertise in the relevant specialty.” *Young*, 112 Wn.2d at 229; see *Larson v.*

Downing, 197 S.W.3d 303, 305 (Tex. 2006) (deferring to trial court's exclusion of surgeon as expert witness where he had not performed relevant surgery in 11 years); *McDougall v. Schanz*, 461 Mich. 15, 597 N.W.2d 148, 151 (1999) (affirming exclusion of expert as unqualified because relevant experience was too remote).²²

Dr. Harding practices maternal-fetal medicine (perinatology), a specialized branch of obstetrics that manages complicated, high-risk pregnancies. (CP 4935-38) Dr. Harding completed a three-year fellowship in maternal-fetal medicine in addition to his residency in obstetrics. (CP 4935) By contrast, Dr. London practices as a gynecologist. Dr. London had previously practiced as an obstetrician, but had not delivered a baby in 11 years and has no hospital privileges that allow him to practice obstetrics. He has no experience or training in maternal-fetal medicine. (CP 4871-73)

²² LabCorp's cases (LabCorp Br. 33-34) are inapposite. In *Eng v. Klein*, 127 Wn. App. 171, 176, ¶ 13, 110 P.3d 844 (2005), *rev. denied*, 156 Wn.2d 1006 (2006), this court confirmed "that a practitioner of one school of medicine is incompetent to testify as an expert in a malpractice action against a practitioner of another school." See also *White v. Kent Medical Ctr., Inc., P.S.*, 61 Wn. App. 163, 173, 810 P.2d 4 (1991) (expert testimony was admissible because expert had "sufficient expertise to demonstrate familiarity with the procedure or medical problem at issue").

Dr. London has *never* worked with genetic counselors in a prenatal diagnostic clinic, has *never* worked for a laboratory that performed cytogenetic testing, and, having *never* practiced as a maternal-fetal medicine specialist, has *no* experience or expertise on how maternal-fetal medicine specialists share responsibilities with genetic counselors. (CP 4874) Dr. London's expertise is in contraception, menopause, and osteoporosis. (CP 4875, 4940) The court did not abuse its discretion in finding that Dr. London "doesn't have anywhere near the expertise that would be needed *in this specific case*" and in excluding Dr. London as an expert. (7/18 RP 46 (emphasis added); CP 3141, 6383-85)

The court also did not abuse its discretion in excluding Dr. London's proposed testimony under ER 703 because the factual basis for his opinion was not of the type "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." ER 703. *See Stedman v. Cooper*, 172 Wn. App. 9, 16, ¶16, 252 P.3d 764 (2012) (reversing exclusion for abuse of discretion). Based on nothing more than "lunch table" polling of medical residents and "gyn people" he did not know and could not identify, Dr. London concluded that Dr. Harding should have reviewed Rhea Wuth's test results himself and determined if follow-

up was necessary. (CP 4876-77) Dr. London then confused the issue in this “lunch table” discussion by asking his unidentified colleagues about the follow up necessary for tests not at issue in this case, including breast biopsies. (CP 4877, 13335)

Each qualified expert testified that Dr. Harding did not breach his duty to the Wuths by relying on LabCorp to select the proper genetic test and on Valley’s genetic counselor to review LabCorp’s report. (RP 750-54, 764, 2673, 2689, 5123, 5129) Dr. London’s proposed testimony that Dr. Harding should have reviewed the test results and made follow-up recommendations conflicted with LabCorp’s own policies, which required *LabCorp* to “make recommendation for additional testing and follow-up.” (CP 4916) The trial court did not abuse its discretion in excluding Dr. London’s testimony.

c. LabCorp could not rely on the Wuths’ geneticist or their perinatologist to allocate fault to Dr. Harding. (LabCorp. Arg. §§ C.2, C.3.a)

Rather than obtain another expert after Dr. London was excluded six weeks before the discovery cutoff, LabCorp sought at trial to allocate fault to Dr. Harding based on the testimony of the Wuths’ experts. (CP 10749-55; RP 5198) Washington law prohibits

one party from co-opting another party's expert; the civil rules required LabCorp to disclose its own expert witnesses. KCLCR 26(k); see *Jones v. City of Seattle*, 179 Wn.2d 322, 341, ¶ 40, 314 P.3d 380 (2013) (defendant may not call witness by "reserving right" to call all witnesses identified by plaintiff); *Crenna v. Ford Motor Co.*, 12 Wn. App. 824, 827–28, 532 P.2d 290 (a party is generally entitled to shield an expert witness from being called as a witness in the opposing party's case in chief), *rev. denied*, 85 Wn.2d 1011 (1975). The trial court did not abuse its discretion in limiting LabCorp's examination of the Wuths' geneticist Dr. Clark and the Wuths' perinatologist Dr. Incerpi to the opinions elicited by the Wuths. (RP 4014-15)

The Wuths, not LabCorp, identified Dr. Clark and Dr. Incerpi as trial witnesses. (CP 268, 270, 13389) Dr. Incerpi's trial testimony does not support LabCorp's contention on appeal that Dr. Harding breached a duty of care by failing "to ensure that all of the pertinent clinical information reached the lab." (LabCorp Br. 28) To the contrary, Dr. Incerpi testified that Dr. Harding met the standard of care if he instructed Valley's medical assistant to send LabCorp Brock's test results, because the report gave LabCorp all the information it needed to determine whether Oliver carried the

translocation. (RP 1099-1100, 2593) Dr. Incerpi also testified that Dr. Harding had no duty to arrange for additional genetic counseling for the Wuths and was entitled to rely on Valley's genetic counselor to review the test results. (RP 2673, 2688)

The trial court also did not abuse its discretion in limiting cross-examination of Dr. Clark to the scope of her direct testimony as an expert on cytogenetics. (RP 1198, 1257-58) Consistent with the Wuths' pretrial disclosure (CP 13389), Dr. Clark testified on direct that LabCorp breached the standard of care of a cytogenetic laboratory because LabCorp was told by Valley of a family history of translocation but failed to inquire about the location of the breakpoints, information that was both readily available and which would have allowed a reasonably prudent laboratory to identify the unbalanced translocation. (RP 1155-61, 1169-74) Dr. Clark also testified that Valley and its medical assistant breached the standard of care by not providing LabCorp sufficient information in the first instance. (RP 1151) Dr. Clark expressly disavowed any opinions concerning Dr. Harding's care. (RP 1190)

LabCorp concedes that it sought to cross-examine Dr. Clark based upon her deposition, not her direct trial testimony, in which she stated that "the information that was provided to [Dr. Harding]

for the laboratory needed to be transferred to the laboratory” – the precise issue that went to the jury. (LabCorp Br. 35 citing RP 1190) But ER 611(b) restricts cross examination “to the subject matter of the direct examination and matters affecting the credibility of the witness.” The rule further states that “[t]he court may, *in the exercise of discretion*, permit inquiry into additional matters as if on direct examination.” ER 611(b) (emphasis added). Thus, “[t]he scope of cross examination is within the broad discretion of the trial court and will not be overturned on appeal absent an abuse of discretion.” *Miller v. Peterson*, 42 Wn. App. 822, 827, 714 P.2d 695, *rev. denied*, 106 Wn.2d 1006 (1986); *Johnson v. Carbon*, 63 Wn. App. 294, 298-99, 818 P.2d 603, *rev. denied*, 118 Wn.2d 1018 (1991). The trial court did not abuse its discretion in ruling that Dr. Clark’s “pre-trial opinions” (LabCorp Br. 35) were not an appropriate subject for cross-examination. (RP 4014)

The trial court also correctly recognized that Dr. Clark was no more qualified to criticize Dr. Harding’s actions than was Dr. London to testify to the standard of care for a maternal-fetal medicine specialist. (RP 1198, 1257, 4014-15) Dr. Clark is a geneticist, not a perinatologist or even an obstetrician. LabCorp’s own motion and order in limine precluded experts from testifying

outside their area of expertise. (CP 5821-31, 10168)²³ LabCorp cannot now complain that it was not allowed to examine the Wuths' geneticist concerning the standard of care of a perinatologist. *Casper*, 119 Wn. App. at 771 ("Under the invited error doctrine, a party may not set up an error at trial and then complain of it on appeal.") (quotation omitted).

3. The jury's verdict that LabCorp's and Valley's negligence caused the Wuths' damages, and the amount of damages, are unaffected by any failure to allocate fault to Dr. Harding.

The jury's determinations of liability, causation and damages are unaffected by the jury's refusal to allocate additional fault to Dr. Harding. The jury's special verdict specifically found that both LabCorp and Valley were negligent, that both LabCorp's and Valley's negligence was "a proximate cause of injury to the plaintiffs," and assessed the Wuths' damages. (CP 11720) Neither Valley nor LabCorp have assigned error to or argued the trial court's refusal to instruct that the doctrine of superseding cause could allow the jury to find that Dr. Harding's actions broke the chain of

²³ LabCorp repeatedly relied on this order in limine to exclude testimony. For example, LabCorp successfully argued for exclusion of Dr. Incerpi's testimony on how laboratory policies should be interpreted, as well as testimony from Dr. Harding's expert that LabCorp violated the standard of care. (RP 1092-93, 3816) Valley likewise successfully argued for exclusion of Dr. Clark's testimony, offered in deposition, regarding Valley's staffing and scheduling practices. (CP 11741-42)

causation so as to absolve LabCorp or Valley of the consequences of their own negligence. (RP 3016-17; see Valley Br. 4; LabCorp Br. 4)

This Court has the authority to limit a remand to separate issues of liability or damages. See e.g., *Mina v. Boise Cascade Corp.*, 104 Wn.2d 696, 707-08, 710 P.2d 184 (1985) (remanding solely for reallocation of fault based on instructional error that related only to liability; “the jury was properly instructed on damages and the special verdict form contained separate questions relating to liability and damages”). Here, any alleged error in refusing to instruct the jury on other “theories” of Dr. Harding’s fault relates solely to the defendants’ proportionate share of fault, and can have no bearing on any of the other issues fully and fairly determined by the jury’s special verdict, including Valley’s and LabCorp’s negligence, proximate cause, and the Wuths’ damages. In the unlikely event of a remand, any new trial should be limited to Dr. Harding’s negligence and defendants’ proportionate share of fault under Question No. 4 on the verdict form. (CP 11720)

4. **Absent evidence of collusion, the trial court had no basis to admit the high-low agreement between Dr. Harding and the Wuths.** (LabCorp Arg. § D.1.b; Valley Arg. § E)

The trial court did not abuse its discretion in excluding from evidence the “high-low” agreement between the Wuths and Dr. Harding (CP 10821) that was fully disclosed one month before trial (10/11 RP 6), and in rejecting their argument that its exclusion mandated a new trial. (1/24 RP 55-59; CP 14210) The agreement established Dr. Harding’s minimum liability to the Wuths of \$500,000 and a maximum liability \$2 million, the limits of his liability insurance. (CP 14277) The agreement was neither “undated” nor “secret,” as LabCorp now claims. (LabCorp Br. 10, 40) It was disclosed in open court on October 11, 2013, two weeks after it was reached. (10/11 RP 6)²⁴ As the trial court told LabCorp’s appellate counsel at the CR 59 hearing, LabCorp “never, ever . . . argued to me that there was a mystery about when the settlement agreement was entered into.” (1/24 RP 56)

²⁴ The last page of the agreement contains a fax stamp dating the agreement September 27, 2013, refuting LabCorp’s assertion that the agreement is “undated” or “secret.” (*Compare* LabCorp Br. 10, 40 *with* CP 14280) That same day, Dr. Harding’s counsel informed LabCorp and Valley of the agreement and offered to provide a copy if they agreed to a protective order. (CP 13650) Counsel for Dr. Harding produced the agreement to LabCorp and Valley the following Monday. (CP 4966-68)

Evidence Rule 408 forbids admission of *all* settlement evidence in civil cases,” not just the *amount* of a settlement as LabCorp argues (LabCorp Br. 39-40), because the jury may misuse the fact of settlement to infer facts about liability or damages. Tegland, 5A Wash. Prac.: Evidence § 408.1 (5th Ed. 2007). Contrary to LabCorp’s argument, *Diaz v. State*, 175 Wn.2d 457, 285 P.3d 873 (2012) makes no distinction between the admissibility of the “mere fact of settlement” and the “settlement amount” (LabCorp Br. 39), and the trial court did not abuse its discretion here in excluding evidence of the settlement itself. Because ER 408 evidence may be admissible for another purpose, trial courts have wide discretion in dealing with agreements alleged to realign the parties. *Duckworth v. Langland*, 95 Wn. App. 1, 5-6, 988 P.2d 967 (1998), *rev. denied*, 138 Wn.2d 1002 (1999); *McCluskey v. Handorff-Sherman*, 68 Wn. App. 96, 105, 841 P.2d 1300 (1992), *aff’d*, 125 Wn.2d 1, 11, 882 P.2d 157 (1994).

LabCorp invokes the specter of “Mary Carter” agreements, ignoring that high-low agreements do “not realign the interests of the parties” because “a settling defendant still ha[s] an incentive to keep the amount of damages down.” *Barton v. State, Dep’t of Transp.*, 178 Wn.2d 193, 212-13 & n.7, ¶ 40, 308 P.3d 597 (2013)

(approving high-low agreements provided they are disclosed to other parties). In its order in limine, the trial court properly ruled that absent evidence of collusion, the prejudice from admitting the “high-low” agreement far outweighed any probative value. (CP 10172; 10/22 RP 105) And there is no evidence of collusion here.

The Wuths did not “voluntarily” limit their claims against Dr. Harding. (LabCorp Br. 27) Dr. Harding moved for summary judgment to limit the negligence claims against him in June 2013, three months *before* the “high-low” agreement was reached. (CP 2590-605, 3140-41) LabCorp and Valley then stipulated to dismissal of any claim “for or relating to failure to obtain informed consent for treatment of Rhea Wuth and/or genetic testing of the fetus carried by Rhea Wuth.” (CP 3133-39) The Wuths’ experts, all of whom had been deposed, could support only one theory: that Dr. Harding was at fault if he failed to instruct Valley’s medical assistant to forward Brock’s genetic test results to LabCorp. The Wuths consistently maintained this theory against Dr. Harding both before and after the agreement was reached in September, and through trial. Neither LabCorp nor Valley even bothered to publish Dr. Harding’s deposition, or otherwise attempt to show that his position had changed. (RP 1884-88, 4015-16) As the trial court

found, this “high-low” agreement was no “ruse” (LabCorp Br. 40) and did not realign the parties in anyway. (1/24 RP 59: Dr. Harding “had [\$]1.5 million reasons to defend aggressively in this case, which he did.”)

5. The trial court committed no error in instructing the jury that the Wuths were fault free. (LabCorp Arg. §§ D.1.a, D.3)

With no citation to the record, LabCorp levels the frivolous accusation that the trial court “elevated [the Wuths’] credibility” at trial by “offering gratuitous praise of the Wuths.” (LabCorp Br. 47) The trial court properly instructed the jury – with no objection from either LabCorp or Valley – that the Wuths were fault-free (CP 11622), under a summary judgment order that neither LabCorp nor Valley can or have challenged on appeal.²⁵

The Wuths were not negligent in failing to obtain a second opinion, or in not directing Dr. Harding to order a FISH test – all issues that defendants repeatedly raised at trial notwithstanding the unchallenged summary judgment order. (See RP 710, 1128, 2686, 4455, 4579-80) The trial court did not abuse its discretion in

²⁵ LabCorp assigns error to the partial summary judgment (CP 1112) and Instruction No. 18 (CP 11622) (LabCorp. Br. 4) but at trial defendants agreed to the instruction (RP 1127-28, 3935-37, 5240) and LabCorp does not identify an issue or argue this assignment of error on appeal. RAP 10.3(a)(4),(6).

repeating that the Wuths bore no fault, given the overwhelming evidence, tragically discovered too late, of appellants' negligence, in order to counter the jury's human propensity to wonder why this family placed their trust in Valley and LabCorp. (RP 3936-37, 4455)

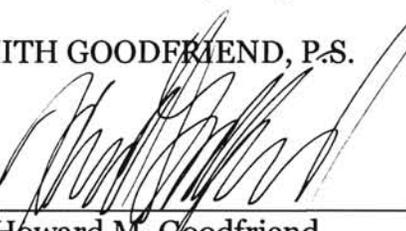
IV. CONCLUSION

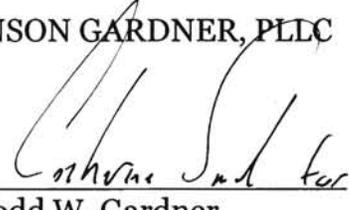
Appellants' negligence caused a lifetime of medical expenses for severely disabled Oliver Wuth, and a lifetime of emotional anguish for his parents Rhea and Brock. This Court should affirm the jury's award of damages authorized by *Harbeson*, supported by substantial evidence, and unaffected by any error in discretionary evidentiary or trial management decisions.

Dated this 9th day of December, 2014.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on December 9, 2014, I arranged for service of the foregoing Brief of Respondents, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 9th day of December, 2014.

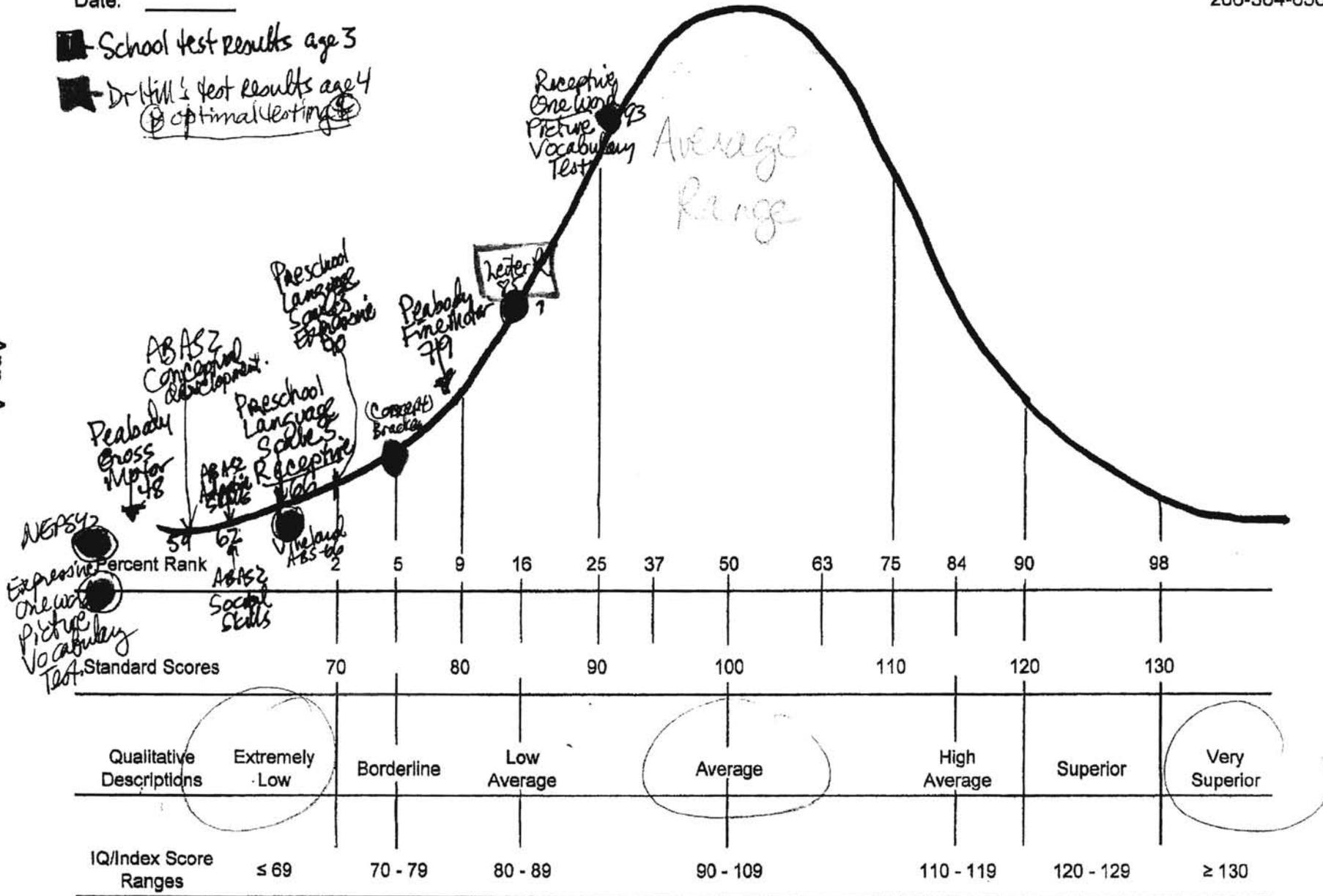


Victoria K. Vigoren

Name: Oliver Wuth
 Age: _____
 Grade: _____
 Date: _____

- School test results age 3
- Dr Hill's test results age 4
- ⊕ optimal hearing ⊕

App. A



3/29/2013