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**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

**AMANDA PITTS and PAUL PITTS, individually; and AMANDA
PITTS as Personal Representative of the ESTATE OF TAYLOR
PITTS, et al., *Appellant*,**

v.

INLAND IMAGING, et al., *Respondent*.

SECOND AMENDED APPELLANTS' BRIEF

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I. INTRODUCTION

This is a medical malpractice action in which the Pitts claim Inland Imaging (Inland) misdiagnosed a twin pregnancy. The Pitts claim causation of: (a) loss of chance of survival; and (b) demise of Taylor Pitts.

Fetuses mature in a chorion, a thick membrane sac. Within a chorion is one or more thin membrane amnions, within which one or more fetuses reside. A chorion is like a leather pouch, and an amnion a water filled balloon. All twin pregnancies are high risk. In dichorionic/diamniotic pregnancies, each fetus is within a separate environment. A monochorionic/diamniotic pregnancy is higher risk, as each fetus is within a separate amnion, but also within a single chorion. Highest risk are monochorionic/monoamniotic pregnancies, in which both fetuses are in a single environment. The latter two represent various risks including: twin to twin transfusion syndrome (“stuck twin”); intrauterine growth restriction (“IUGR”); and umbilical cord entanglement resulting in blood restriction and demise.

Inland diagnosed dichorionic/diamniotic, while the delivery report and pathology of delivery concluded monochorionic/diamniotic, with rupture of amniotic membranes, and umbilical cord entanglement resulting in the demise of Taylor Pitts. At delivery, there was indication of “stuck twin” as a thin membrane was plastered over Taylor Pitts.

At trial, plaintiffs' radiology expert Dr. Patten testified that he found insufficient evidence of thick membranes to conclude a dichorionic pregnancy. Over plaintiffs' objection, the defense cross examined Dr. Patten on the defense theory of observation of a "twin peak" sign. "Twin peak" was never raised in direct examination. Dr. Patten stated he didn't use, and was no expert in "twin peak" methodology. The defense witnesses testified their diagnoses was based on "twin peak" methodology. Plaintiffs rebuttal witness Dr. Finberg, the nation's leading expert on "twin peak" methodology, was not allowed to rebut the defense "twin peak" testimony. The court concluded that Dr. Patten, not an expert in "twin peak," covered the area sufficiently in cross examination. The Pitts loss of chance claim was also dismissed as the court concluded greater than 50 percent loss of chance is an ordinary tort claim. Over plaintiffs' pretrial objections, the defense was allowed three expert witnesses. Their testimony was cumulative in part and extremely divergent in part. Dr. Finberg was also to address the clinical appearance of a possible "stuck twin" during the pregnancy, which should have caused Inland to reassess their diagnosis. This was also disallowed. Finally, the court restricted all rebuttal testimony by plaintiff.

Due to the foregoing individual and cumulative errors the Pitts were not afforded a fair trial.

II. ASSIGNMENTS OF ERROR

No. 1. The trial court erred when it allowed Inland to obtain twin peak testimony from Pitts' expert Dr. Patten, when it was not addressed in direct examination, and Dr. Patten was not a twin peak expert.

No. 2. The trial court erred in unduly restricting the scope and time allowed for Dr. Finberg's rebuttal testimony and in excluding Professor Coffin's rebuttal testimony.

No. 3. The trial court erred when it did not allow Dr. Finberg's rebuttal testimony by video conference.

No. 4. The trial court erred in allowing Inland to present cumulative and speculative expert testimony which was not helpful to the trier of fact.

No. 5. The trial court erred when it denied the Pitts' request to voir dire Inland's expert physician Mary D'Alton outside the presence of the jury as an offer of proof. Inland would not be prejudiced by testimony relating to "intra uterine growth restriction" and "stuck twin."

No. 6. The trial court erred when it allowed Inland's counsel to cross-examine Dr. Patten about the twin peak signs.

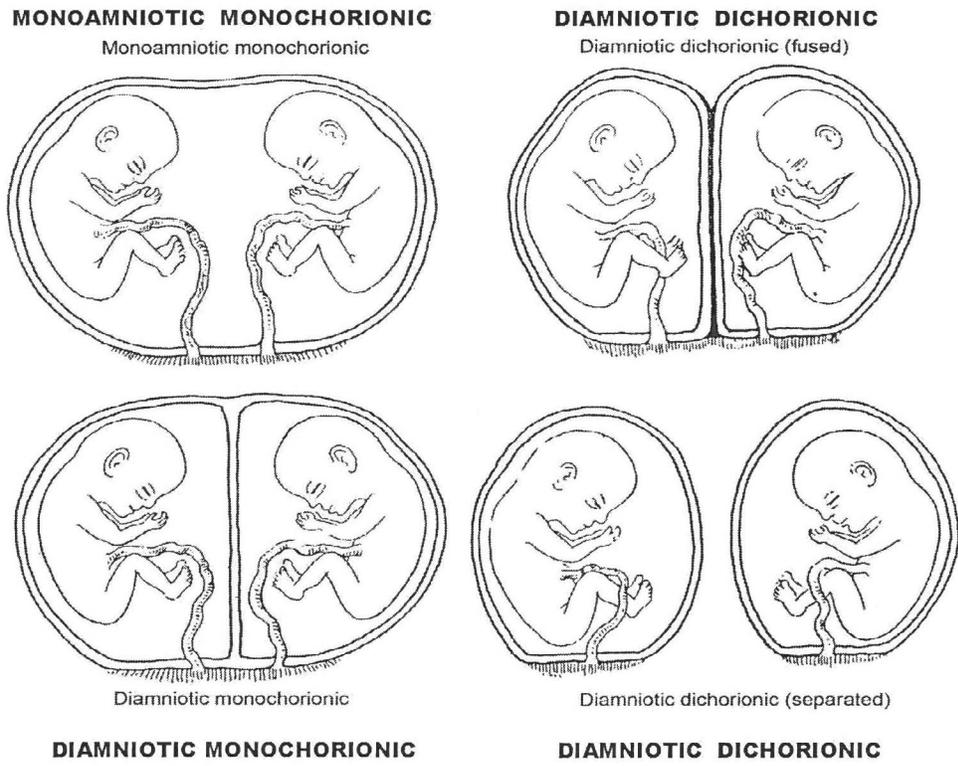
No. 7. The trial court erred when it granted Inland's motion for partial summary judgment dismissing the Pitts' loss of a chance claim.

III. STATEMENT OF THE CASE

This is a medical malpractice, wrongful death and survival case. Amanda and Paul Pitts (the Pitts) contend negligence by Inland in interpreting ultrasound imaging of the Pitts' twin pregnancy proximately caused the in-utero demise of Taylor Pitts, while her identical twin sister, Samantha, survived. (CP 1-3). The case was tried in Spokane County Superior Court from February 4, 2014 through February 20, 2014. On February 20, 2014, the jury returned a defense verdict and judgment was entered on March 14, 2014. Pitts' motion for a new trial was denied on April 25, 2014. (CP 1590-1592). This appeal followed.

At issue was whether Inland breached the standard of care when it misdiagnosed the chorionicity and amnionicity of the Pitts' twin pregnancy. (CP 5-8). Twins occur when two separate eggs are fertilized, or one fertilized egg splits into two. (RP filed 11/3/14, hearing 2/10/14, p. 197-198). A dichorionic/diamniotic twin pregnancy usually occurs from two separately fertilized eggs (dizygotic), resulting in non-identical twins. (CP 280) A dichorionic/diamniotic twin pregnancy can also occur from early splitting of a single fertilized egg (monozygotic), resulting in identical twins. (CP 280) In a dichorionic pregnancy, each fetus is contained within a separate sac (chorion) and is nourished by a separate placenta. (CP 280) The next higher risk type of twin pregnancy is a

monochorionic/diamniotic twin pregnancy. (CP 281) This is a monozygotic twin pregnancy where a single fertilized egg splits at a later time than one causing a dichorionic identical twin pregnancy. (CP 281) The twin fetuses are contained within one sac separated by a thin membrane dividing the sac into two compartments (amnions). The risk is higher because the twins share a single placenta, and are separated only by a thin amniotic membrane rather than a thicker, multi-layered dichorionic/diamniotic membrane. (CP 281)



(Trial Exhibit P-20).

One risk is twin to twin transfusion syndrome, where twin fetuses

share a single placenta, and where one twin draws more blood flow than the other. This takes needed blood flow and nutrients away from the other twin. (CP 281) Another risk is unequal physical sharing of the single placenta, and, therefore, the nourishment provided by the placenta. There is also increased risk of “intrauterine growth restriction” (IUGR) where fetal size or growth is restricted due to abnormal placental health. Finally, there is also risk of disruption or tearing of the amniotic membrane between the twins, effectively causing the monochorionic/diamniotic twin pregnancy to become a monochorionic/monoamniotic twin pregnancy (discussed below). Such risks cause various complications which affect the development of one or both fetuses, and some of which may result in the demise (death) of one or both fetuses, if left untreated or unmanaged. A disruption or tear can result from invasive procedures, such as an amniocentesis procedure, or spontaneously, due to unknown causes. (CP 280-282)

The Pitts contend Inland breached the standard of care because its radiologists misdiagnosed the Pitts’ twin pregnancy as dichorionic/diamniotic when in fact it was monochorionic/diamniotic according to the post delivery pathology report. (RP filed 11/3/14, hearing 2/10/14, p. 256-261). This is supported by the Pitts’ OB/GYN Dr. Hardy, who delivered the Pitts twins, Samantha live, and Taylor stillborn. Dr. Hardy reported

Taylor to be covered by a membrane, and apparently succumbing to umbilical cord entanglement with Samantha's cord, indicating that the diamniotic twin pregnancy suffered from a disruption of the amnion, rendering it to functionally become a monochorionic pregnancy. (Trial Exhibit D-104).

The Amended Case Schedule Order provided: the Pitts' disclosure of lay and expert witnesses was due on July 8, 2013; Inland's disclosure of lay and expert witnesses was due on September 9, 2013; the Pitts' disclosure of rebuttal witnesses was due on October 14, 2013; and the discovery cutoff was December 2, 2013. (CP 131).

On March 1, 2013, the Pitts moved, in part, to limit Inland's expert witness testimony. (CP 88-94). At that time, Inland had named eight expert witnesses, including six physicians. (CP 90). This was to limit the repetitive (duplicative of specialty/board certification) and cumulative expert testimony. (CP 93). Also, given the geographical spread of the defense experts from New York to California, there would be unreasonably excessive cost in deposing them all. (CP 89). On March 15, 2013, the court heard argument on the Pitts' motion. (RP filed 11/3/14, hearing 3/15/13, p. 4). The court denied the Pitts' motion as premature. (RP filed 11/3/14, hearing 3/15/13, p. 10).

From February 28 through December 9, 2013, Pitts' counsel's

paralegal contacted defense counsel's office no less than a dozen times requesting deposition dates for their multiple experts. (CP 20, 32).

However, Inland repeatedly failed to make their experts available until a time beginning just before and continuing after the discovery cut-off.

The Pitts' counsel took multiple depositions in Washington, Oregon, California and New York. (CP 335, 343, 571-72, 848). Inland did not make an expert witness available until five days before the October 14, 2013 due date for the Pitts disclosure of rebuttal witnesses. Defense experts were deposed as follows: Dr. Tomlinson (Neonatologist) on October 9, 2013 (Portland OR); Dr. Filly (Radiologist) on November 13, 2013, and Dr. Callen (Radiologist) and Drabkin Ph.D. (Economics) on November 14, 2013 (San Francisco CA); Dr. D'Alton (Neonatologist) on December 16, 2013 (New York City); Dr. Nyberg (Radiologist) on December 18, 2013 (London, England, by phone); and Wicher Ph.D. (Psychology), January 30, 2014 (Portland, OR). Inland also conducted discovery depositions after the December 2, 2013, discovery cutoff date. (CP 850-51, 855; RP filed 11/3/14, hearing 1/17/14, p. 96-97). It must be noted that neonatologist Tomlinson and D'Alton also performed ultrasound studies. Neither had any testimony as to neonatology, as no claim was being made by the Pitts against their OB/GYN, Dr. Hardy. Essentially, both Drs. Tomlinson and D'Alton provided standard of care

type testimony on ultrasound and causation. Thus, Inland was offering five witnesses on the standard of care.

On or about December 6, 2013, Inland's moved for partial summary judgment or in the alternative a CR 12(b)(6) motion to dismiss the Pitts' loss of a chance claim. (CP 133-139). Pitts' opposed the motion. (CP 151-254). The court granted the motion by a letter decision on January 8, 2014 (CP 584-85) and denied Pitts motion for reconsideration on February 11, 2014. (CP 1127-1130). The court's denial of loss of a chance was due to testimony of percentage of loss greater than 50%. (CP 585).

Pitts presented the testimony of Dr. Patten on this issue at paragraphs 17 and 19 of his declaration filed December 27, 2013. In paragraph 17 Dr. Patten said if negligence did not occur there was a 90% chance of survival of both twins in the general literature in this area. A reasonable reading of paragraph 19 indicates these twins would have a 90% chance of survival if Dr. Hardy, the treating physician, had been properly advised of the twins' circumstances. As this percentage exceeds 50% it does not support giving the lost chance of survival instruction to a jury. Inland's Motion for Summary Judgment is granted.

Court's Letter Ruling. CP 50

On December 26, 2013, Pitts' counsel served a Second Amended Disclosure of Lay and Expert Witnesses. (CP 511-514). Harris J. Finberg, M.D. (Radiologist), and Professor Carolyn T. Coffin, MPH. (Sonography) (*Id.*) were identified, in response to the nature and extent of

Inland's experts' testimony. *Inland's experts Drs. D'Alton, Nyberg, Callen, Filly, and Tomlinson testified in deposition that there was an appearance of a "twin peak sign" in the August 10 and August 27 ultrasound imaging. This twin peak sign was diagnostic of and would allow a reasonable sonographer and maternal/fetal ultrasound specialist/radiologist (radiologists) to conclude Ms. Pitts twin pregnancy was dichorionic and diamniotic.* Also, that because of this, there was no breach of the standard of care for sonographers and for radiologists. Further, that there was no finding or record in Ms. Pitts' subsequent ultrasounds to bring that diagnosis into question until the January 7, 2008, ultrasound in which it appeared one twin had suffered demise.

Previously, in responding to the Pitts' interrogatories concerning experts' opinions, responses which were never updated by Inland, *the only information provided about Inland's experts' opinions was generic*, as follows (using a response for Dr. Callen as an example):

He will be called to testify regarding his review and interpretation of certain ultrasounds in this case. He will testify that certain radiologists at Inland Imaging met the standard of care in their interpretations of the imaging. He will testify that Inland and their employees met the standard of care and did not proximately cause any damage. This answer will be supplemented. Dr. Callen is board certified in diagnostic radiology. He specializes in the field of diagnostic ultrasound. While Inland intend to call experts to address each of the studies that Pitts allege were negligently interpreted, it is difficult to fully predict, prior to the completion of discovery, if any one witness will be cumulative of another. Inland will not ask their experts to testify cumulatively at the time of trial.

CP 575-580

Dr. Finberg is the leading American expert on the “twin peak sign.” It was he who first published and spoke about it in America.

Dr. Filly confirms this. (RP filed 11/3/14, hearing 2/11/14, p. 418).

This is noted in Dr. Finberg’s C.V.:

Finberg, HJ. The "Twin Peak" Sign: Reliable evidence of dichorionic twinning. *Ultrasound in Med.* 11:571-577, 1992. (CP 1208); Finberg, HJ. The "Twin Peak" Sign: Definitive evidence of dichorionic twinning. Accepted for AIUM Annual Convention 1992, San Diego. March 8-11, 1992. (CP 1211)

On January 6, 2014, Inland, in spite of their “Gamesmanship” in delaying discovery on their experts, moved to exclude the Pitts’ recently disclosed witnesses, based upon late disclosure in violation of the applicable case schedule order. (CP 497-504). Inland’s counsel asserted they were prejudiced by the late disclosure. (CP 497-504; RP filed 11/3/14, hearing 1/17/14, p. 95-96). *Inland counsel’s assertion was not supported by testimony in the form of a declaration or otherwise from their five disclosed medical experts, one disclosed economic expert, nor their one disclosed psychological expert. (Id.).*

Pitts’ counsel filed and served a memo and declaration in response. (CP 846-852; 854-55). On January 17, 2014, the court issued its oral ruling that Dr. Finberg and Professor Coffin would be designated limited

rebuttal witnesses. The court considered: (1) whether Inland were prejudiced; (2) lesser sanctions; and (3) whether Pitts' counsel's late disclosure was "excusable neglect" (RP filed 11/3/14, hearing 1/17/14, p. 111-115). On January 23, 2014, the court entered an order in part designating Dr. Finberg and Professor Coffin as rebuttal witnesses. (CP 947-949). The specific factors articulated by *Burnet v. Spokane Ambulance*, 131 Wn. 2d 484, 494-97, 933 P.2d 1036 (1997) and its progeny, were not set forth in the court's oral ruling or written order (*please see* part V, *infra*).

On January 7, 2014, the Pitts moved a second time to limit the number of Inland expert witnesses. (CP 561-570). The basis of the motion was, in part, that Inland proposed expert testimony was cumulative. (CP 566-69). On January 23, 2014, the court entered an order allowing Inland to call either Dr. Nyberg or Dr. Callen to testify about standard of care; Dr. Filly to testify about causation, and Dr. D'Alton to testify about causation and standard of care. (CP 948-49).

On January 27, 2014, Inland brought a second motion to strike or limit Pitts' expert Harris J. Finberg, M.D. (CP 950-958). Again, the basis of the Inland's motion was, in part, late disclosure. (*Id.*). On January 30, 2014 the trial court heard argument and on January 31, 2014, and without medical testimony to provide foundation, entered an order in part

excluding Dr. Finberg from offering testimony on any “late disclosed and/or undisclosed” liability theories including, but not limited to, “stuck twin” and IUGR. However, at no time did the Pitts purport to regard that stuck twin and IUGR were liability theories. Rather, per the affidavit of proof on Dr. Finberg’s testimony, they were issues of differential diagnosis based on the physical birth evidence of the demised twin, Taylor, being in a shroud of membrane. (RP filed 11/14/14, hearing 1/30/14, p. 70-83; CP 1041-42). *The court did not separately consider, on the record, whether the defense was substantially prejudiced in preparation for trial, whether lesser sanctions would suffice, and whether Pitts’ counsels’ failure to disclose Dr. Finberg in accordance with the case schedule order was “willful.”* (Id.).

On February 12 and 13 2014, there was additional discussion between the court and counsel with respect to the scope of Dr. Finberg’s testimony, stuck twin, IUGR, and related subjects. (RP filed 11/3/14, hearing 2/12/14, p. 568-571; hearing 2/13/14, p. 572-580). Again, without any medical testimony that stuck twin and IUGR were “new” medical issues, the court did not consider, on the record whether Inland was substantially prejudiced in preparation for trial, whether lesser sanctions would suffice, and whether Pitts’ counsels’ failure to disclose Dr. Finberg in accordance with the case schedule order was “willful.” (Id.). The court

was concerned with Pitts' counsels' late disclosure. The court never addressed Pitts' counsel's complaints of Inland's gamesmanship by evidence of their total delay in making their experts available for deposition, and never updating the pertinent interrogatories. (RP filed 11/3/14, hearing 2/12/14, p. 568-570; RP filed 11/3/14, hearing 2/13/14, 576-579; CP 846-864).

Prior to trial, the court ordered in limine that counsel should not comment on failure to call an expert witness. Counsel for Inland violated this during opening statement, and "opened the door" for Pitts' to call Dr. Finberg and Ph.D. Coffin.

"The twin peak sign is the most important feature of determining chorionicity in fetal ultrasound. I'm not just saying that, we're not trying to sell you that, it's written in Dr. Callen's book. You'll meet him. It's written in all the literature of the last 20 years, that the twin peaks has varying degrees of importance. All the experts in this case, including Dr. Patten, *who is the only expert for the plaintiff*, say that the twin peak sign has great value. The witnesses, who I will describe in greater detail for the defense, will tell you it's the single most reliable test you can use."

(RP filed 11/14/14, hearing 2/6/14, p. 122)

Again, the Pitt's expert witness **Harris Finberg, M.D., is the nation's premier expert regarding the twin peak sign.** (RP filed 11/3/14, hearing 2/10/14, p. 308; hearing 2/11/14, p. 418; hearing 2/18/14, p. 494-95; 526). Pitts' primary expert witness, Radiologist Randall Patten, M.D. is not an expert on the twin peak sign. (RP filed 11/3/14, hearing

2/10/14, p. 307-308). Dr. Patton's testimony as to breach of the standard of care did not require assessment of a twin peak sign, a method which he does not believe is determinative of chorionicity. Rather, he primarily relies on the observable and measurable thickness of a dividing membrane to determine if it represents a chorion (thick) or amnion (thin), and counts layers of membranes (2 for monochorionic and 4 for dichorionic). (RP filed 11/3/14, hearing 2/10/14, p. 201-204, 224-225, 227-228, 242-244). Defense experts Filly and Callen apparently agreed regarding measurement, according to Dr. Patton's reading to the jury of excerpts from a journal article written by them:

"BY MR. RICCELLI:

Q. Page 460 there's a highlighted paragraph. It's not highlighted in your book, but the...

A. You need me to read the entire paragraph?

Q. Why don't you summarize what it says and why it's consistent with your testimony.

A. It basically stated some of the things I just talked to the jury about. It says if a single placental mass is identified sonographically, it's uncertain whether the placenta is dichorionic or monochorionic. The next and simplest step to take in this circumstance is to determine fetal sex. If the examiner can show confidently that one of the twins is male and the other is female, then dizygosity is confirmed, in other words there's two eggs, and dichorionicity and diamnionicity may be inferred with certainty, because you've got, basically, two different genders. This is one of the most clinically relevant uses of sex determination in fetuses. Unfortunately if a single placental mass is seen and the twins are

some of the same sex, zygosity remains uncertain and chorionicity cannot be predicted.

Q. Okay. And down at the bottom there's some verbage I've highlighted, starts with "therefore." Would you read that to the jury, please. Next to the last paragraph.

A. Therefore, judgment of membrane thickness is always done more accurately earlier in pregnancy than later. *In our experience, this judgment can be made with a high degree of accuracy before 22 weeks of gestation. Especially in the late first trimester and early second trimester, membrane thickness can be judged with ease and virtual 100% accuracy.*"

(RP filed 11/3/14, hearing 2/10/14, p. 206-207) (Emphasis added)

Dr. Paton believes his preference of actual measurement is more accurate than visual assessment alone, including twin peak assessment. Defense expert Dr. Filly doesn't disagree, as in cross examination, he differentiates the process of manual measurement from visual assessment, as in the twin peak sign assessment.

It is critical to recognize that, *on direct and redirect examination, Dr. Patton did not address the twin peak method of assessment. He found a breach of the standard of care due to the fact that in the first two ultrasounds taken by Inland, in August of 2007, the resulting measurement of the dividing membranes was too insufficient, and four membrane layers were not observable, so as to allow for a determination of dichorionicity.* (RP filed 11/3/14, p.195-296, 390-394). It was on cross examination that he was questioned about the twin peak assessment, over

objection by the Pitts' counsel. (RP filed 11/3/14, hearing 2/10/14, p. 369-377, 379, 381-388).

Dr. Patton is not an expert in the twin peak sign, as he does not utilize this method of assessment. It is his understanding, however, that here, the appearance of the membrane(s) was too wispy to be a twin peak sign. This is consistent with his measurement and counting of membrane layers methodology. Dr. Patten identified other breaches of the standard of care by Inland which allowed for Taylor Pitts' demise. (RP filed 11/3/14, hearing 2/10/14, p. 256-266, 271-275). This included the four quadrant AFI calculations of Inland, which contradicted radiology and sonography guidelines that required membrane visualization. (RP filed 11/3/14, hearing 2/10/14, p. 202-207-228, Exh. P-16). Inland's counsel (in opening) and their experts, Drs. D'Alton and Callen, on direct, denied AFI error. (RP filed 11/14/14 hearings 2/6/14, p. 136-137, 2/18/14 p. 3, 348, 399). When considering Dr. Hardy's testimony and the literature, Dr. Patten stated Taylor Pitts would almost assuredly have been born alive, had Dr. Hardy been advised of the true nature of the chorionicity and amnionicity of the Pitts pregnancy.

In testimony at trial, the Pitts' OB/GYN (and the physician who delivered Taylor and Samantha Pitts) Dr. Hardy, found substandard reporting by Inland, including failure to advise Dr. Hardy that an inter

twin membrane was not always and consistently being visualized during the assessment of amniotic fluid volumes to each twin. (RP filed 11/3/14, hearing 2/10/14, p. 249-254).

Dr. Patton also testified:

“Based on the literature, I believe that there was a decreased chance of survivability without this knowledge being imparted to the obstetrician. Statistically the twins would have survived, according to this literature. And that's basically all I can say, is that based on statistics, based on what Dr. Hardy said he would do, statistically there would be a better outcome.”

(RP filed 11/3/14, hearing 2/10/14, p. 289).

This testimony was stricken, based on the court's earlier ruling granting Inland's motion for partial summary judgment; or in the alternative CR 12(b)(6) motion with respect to Pitts' loss of a chance claim. (CP 584-85).

In cross examination, Inland's counsel, with the blessing of the court, and over Pitts' counsel's objection, co-opted Dr. Patten to be an expert on twin peaks sign for Inland. (See Appendices para. 2).

On February 18, 2014, the court entertained Pitts' counsel's request to voir dire Dr. D'Alton outside the presence of the jury. (RP filed 11/3/14, hearing 2/18/14, p. 581). The purpose of the requested voir dire was to show that Dr. D'Alton did not consider “stuck twin,” IUGR and related subjects “new issues” or a “surprise” because they were standard

differential diagnoses given the facts of this case. (RP filed 11/3/14, hearing 4/25/14, p. 650-653). This is confirmed by Dr. Callen in the text he edited on monoamniotic twins stating that should a dividing membrane not be seen in early ultrasounds the diagnosis of monochorionic-monoamniotic twins (the most risky of twin births) should be considered. (See Appendices para. 3).

Further, Dr. Hardy , the Pitts' OB/GYN, testified that the biggest concern in a monochorionic-diamniotic pregnancy is the twin to twin transfusion. That in severe cases that are late in diagnosis of twin to twin transfusion, the one baby can look like its stuck to the side without fluid around it. There was no fluid around the deceased baby at the time of delivery and it had a membrane covering it. (See Appendixes para. 4)

The assertion these issues were “new” and a “surprise” came from Inland’s counsel, not their experts. (RP filed 11/3/14, hearing 4/25/14, p. 651). There is simply no supporting expert testimony in the record. From the time of Taylor Pitts’ stillbirth, cause of the (apparent) amniotic membrane covering her body, and lack of her own amnion filled with amniotic fluid has been a known issue. Various textbook conditions would be considered in a differential diagnosis, including “Twin to Twin Transfusion Syndrome” (and resulting stuck twin). Prior to Dr. D’Alton’s cross examination, counsel for the Pitts requested to *voir dire* her outside

the presence of the jury. The court denied this, and stated *voir dire* could occur in front of the jury. (*Id.*). Yet, on cross examination, the court prohibited Pitts' counsel from *voir dire* based on the January 31, 2014 order referenced above, prohibiting comment on stuck twin and IUGR in front of the jury. (RP filed 11/3/14, hearing 2/18/14, p. 487-488; CP 1041-1042).

On February 19, 2014, the court heard argument and ruled on the Pitts' motion to present rebuttal testimony of Dr. Finberg and Professor Coffin (CP 1170-1247). Pitts submitted their Offer of Proof on February 19, 2014. (CP 1368-1411; RP filed 11/3/14, hearing 2/19/14, p. 615-618, p. 619-644). Dr. Finberg had prepared a power point presentation in which he isolated ultrasound images in which the amniotic membrane was on and surrounding Taylor Pitts in October 2007. This was specifically to rebut testimony of Dr. Callen that the membrane was visualized (intact) in December 2007. (RP filed 11/14/14, hearing 2/18/14, p. 407-408). The court denied this as a reference to stuck twin and IUGR, as further discussed below.

The court excluded Professor Coffin from testifying. (CP 1502-1504; RP filed 11/3/14, hearing 2/19/14, p. 618). It ruled Dr. Finberg could testify remotely by an audio-video link promptly at 1:30 (on February 20, 2014) allocating 20 minutes to each side regarding the

following limited subjects: Dr. Finberg's education, training and experience; when the inter-twin membrane was breached and where on the ultrasounds he believes the membrane collapsed. He could not testify with respect to the twin peak sign (except to testify he wrote an article about it); how thick or thin the membrane was; IUGR or "stuck twin." The court stated he could only identify himself, review his educational background, any articles he had written, his curriculum vitae, and provide his opinion on whether or not the membrane was breached spontaneously using the digitized image. (See Appendixes para. 5)

Again, the court did not engage in a *Burnet* analysis. (CP 1502-1504; RP filed 11/3/14, hearing 2/19/14, p. 615-618; p. 619-644). The court expressed displeasure with Pitts' counsel's late disclosure of Dr. Finberg and Prof. Coffin. (RP filed 11/3/14, hearing 2/19/14, p. 630-636).

The trial court set forth specific conditions for Dr. Finberg's audio-video testimony (Dr. Finberg was in Arizona). The court decreed Pitts' counsel was to have the audio-visual equipment set-up, tested and ready to go by 1:30 pm the next day, February 20th. It also wanted the video to show both Dr. Finberg and the exhibit at issue on the screen for the jury to see. (RP filed 11/3/14, hearing 2/19/14, p. 632-635).

During the morning of February 20, 2014, Pitts' counsel set up the audio/visual equipment in the courtroom and established a link to a Regis

Office facility in Phoenix, Arizona. By noon, a computer video and audio link were established. The witness, the questioning attorney, and the evidence could be displayed on the screen. Dr. Finberg had a laptop computer which could control Pitts' counsel's laptop and therefore, the display of the evidence in the courtroom. The only outstanding issue was the relative sizing of the evidence panel which was being adjusted manually. (CP 1519-1520).

The video conference technical support person was advising Pitts' counsel where the proper adjustment could be made from the menu on the software program. Pitts' counsel was adjusting it when the judicial assistant informed him that Dr. Finberg (who was only allotted 20 minutes) would not be allowed to testify because she wasn't satisfied with the relative size of the video panels. At noon, the judicial assistant directed Pitts' counsel to vacate the courtroom for the lunch break. At approximately 1:00 p.m., the judicial assistant directed Pitts' counsel to dismantle the video conference equipment. Dr. Finberg was the only witness scheduled to testify on February 20th. (CP 1528-1530).

After the defense verdict, Pitts moved for a new trial. (CP 1515-1532). On April 25, 2014, the court denied the motion. (CP 1590-1592; RP 660-663). This appeal followed.

IV. SUMMARY OF ARGUMENT

This court should reverse and remand the case because the trial court committed several errors which resulted in the exclusion of testimony from Pitts' experts Harris Finberg, M.D., and Professor Carolyn Coffin. Specifically, the court did not apply the correct *Burnet v. Spokane Ambulance, infra*, analysis with respect to its January 23, 2014, Order and did not undertake a separate required *Burnet* analysis prior to entering its January 31 and February 21, 2014, Orders regarding Dr. Finberg's and Professor Coffin's testimony. This was an abuse of discretion and the only appropriate remedy is to reverse and remand for a new trial.

The court compounded these errors on February 20 when it (or its judicial assistant) arbitrarily prohibited Dr. Finberg's limited live video testimony. The precise reasoning behind the prohibition is unclear from the record. However, as explained below, it is clear that Pitts' counsel was not afforded the opportunity articulated in the court's February 19, 2014 oral ruling to set up the audio-visual equipment in order to present Dr. Finberg's testimony. The court's multiple errors with respect to Dr. Finberg's testimony prevented the Pitts' ability to present their case. Again, the trial court abused its discretion and the appropriate remedy is to reverse and remand for a new trial.

In addition, the court abused its discretion by allowing Inland to

present speculative, cumulative (as to fault) and wildly disparate (as to causation) expert testimony. This error was magnified by the fact the court limited the Pitts' experts, as summarized above.

Moreover, the court inconsistently ruled Pitts' counsel would be allowed to *voir dire* Mary D'Alton, M.D. outside the presence of the jury and then reversed itself, for no apparent reason, and did not allow Pitts' counsel to *voir dire* at all. The purpose of the requested *voir dire* was to show that Dr. D'Alton did not consider "stuck twin", IUGR and related subjects "new issues" or a "surprise" because they were standard conditions in a differential diagnoses given the facts of this case. These errors constitute an abuse of discretion and this court is requested to reverse and remand for a new trial.

Finally, the court improperly dismissed the Pitts' loss of a chance claim contrary to *Herskovits v. Group Health Coop.*, 99 Wn. 2d 609, 664 P.2d 474 (1983) and *Mohr v. Grantham*, 172 Wn.2d 844, 262 P.3d 490 (2011). For all these reasons, this court is requested to reverse the judgment and remand the case for a new trial.

V. ARGUMENT

A trial court exercises broad discretion in imposing discovery sanctions under CR 26(g) or 37(b), and its determination will not be disturbed absent a clear abuse of discretion. An abuse of discretion occurs

when a decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." A discretionary decision rests on "untenable grounds" or is based on "untenable reasons" if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is "manifestly unreasonable" if "the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take.'" *Mayer v. Sto Indus., Inc.* 156 Wn.2d 677, 684, 132 P.3d 115 (2006). (Internal citations omitted).

In the case at bench, the trial court entered at least three formal orders and made numerous additional oral rulings with respect to the admissibility of Pitts' proposed expert witnesses Harris Finberg, M.D. and Professor Carolyn T. Coffin, MPH, and the scope of their proposed testimony, if any. The basis of the orders and rulings was due to late disclosure by the Pitts in violation of the amended case schedule order and upon Inland counsel's assertion they were prejudiced by the late disclosure. Inland counsel's assertion was not supported from testimony in the form of a declaration (or otherwise) from any of their three expert witnesses. As explained below, the trial court followed the wrong legal standard in fashioning these orders and rulings. The trial court's decisions constitute an abuse of discretion which require a new trial.

A. The Trial Court Erred When it Prohibited Testimony Relating to The Medical Condition Referred to as Stuck Twin When There Was Physical Evidence to Consider This Condition.

Dr. Hardy testified that there was apparently no fluid (amniotic) around the deceased twin (Taylor), and there appeared to be a membrane covering it at the time of the delivery of the twins.

A “stuck twin” is defined as follows:

“The stuck twin is part of the twin-twin transfusion syndrome. The easiest-to-understand explanation is that within the single placenta of a monochorionic twin pair, there are arteriovenous communications between the circulation’s of the twins. One twin (the donor) shunts blood to the other (recipient) twin. The donor does not grow well, it loses its amniotic fluid, thus cannot swallow, cannot urinate, and eventually it is shrink-wrapped in its amnion.”

Joseph A. Worrall, MD, RDMS, *Pregnancy and Birth: Stuck Twin*, 2011, ObGyn.net, <http://www.obgyn.net/obgyn-ultrasound/stuck-twin>

B. The Trial Court Erred in Severely Restricting and Ultimately Denying Dr. Finberg’s Rebuttal Testimony and in Excluding Professor Coffin’s Testimony on Rebuttal.

Rebuttal evidence is admissible to allow the plaintiff an opportunity to answer new material presented by the defense. *McGreevy v. Or. Mut. Ins. Co.*, 74 Wn. Ap. 858, 871, 876 P.2d 463 (1994) (overruled on other grounds); *Panorama Village Condo Owners Ass’n Bd. Of Dirs. v. Allstate Ins. Co.*, 144 Wn.d2d 130, 26 P.3d 910 (2001). Frequently, true rebuttal evidence will, to some degree, overlap or coalesce with the evidence in chief. (*Id.*) The question of admissibility of evidence on

rebuttal rests within the discretion of the trial court. (*Id.*) Error denying or allowing it is reviewed for a manifest abuse of discretion. (*Id.*)

In the present matter, the “twin peak” sign was a pillar of Inland’s case. Inland’s counsel referred to it in opening argument and in cross examination of the Pitts’ expert Randall Patten, M.D. (over objection). Inland’s experts Callen, Filly and D’Alton all testified Inland met the standard of care in their interpretation, use and reliance on the twin peak sign.

As discussed above, on January 23, 2014, the court ordered Dr. Finberg and Professor Coffin be designated as rebuttal witnesses, and whether rebuttal testimony would be allowed was reserved for another time. On January 31, 2014 the court excluded Professor Coffin and prohibited Dr. Finberg from offering testimony with respect to any “late disclosed” and/or undisclosed liability theories, including but not limited to, stuck twin and IUGR. On February 21, 2014, the court entered an order restricting Dr. Finberg’s live video conference testimony to 20 minutes for the Pitts and 20 minutes for the defense. The order provided Dr. Finberg could testify as to when the intra twin membrane was breached and that he could show in the ultrasounds where he believed the membrane collapsed. The order prohibited Dr. Finberg from testifying regarding the twin peak sign (except that he wrote an article about it).

The court erred in unduly restricting the scope and time of Dr. Finberg's rebuttal testimony. Dr. Finberg is a pioneer in recognizing and applying the twin peak sign. He was prepared to testify, on rebuttal, that the Inland's recognition and application of the twin peak sign was flawed. Specifically, Dr. Finberg was prepared to testify that the August 10 and 27, 2007, ultrasounds did not evidence a reliable twin peak sign upon which Inland could have reasonably concluded Mrs. Pitts' pregnancy to be dichorionic. In addition, he would have opined there was evidence of a collapsing or collapsed membrane as early as October 4, 2007, and described how it was situated upon the demised twin, Taylor Pitts.

Moreover, he would have testified with respect to the proper use and application of the twin peak sign using a specific decision making sequence. This required the sonographers to capture all imaging of any unique, non-duplicative views of the pregnancy, and that the radiologists thoroughly review all the imaging which was available. He would have testified Inland did not do this and that was below the standard of care. Finally, he contended the radiologists could not rely on amniotic fluid volume calculations if there was not a clear visualization of an intact inner twin membrane. (Pitts' Offer of Proof, CP 1368-1411).

The trial court abused its discretion by prohibiting Dr. Finberg from rebutting Inland's primary defense, the twin peak sign. It abused its

discretion by prohibiting his testimony that the radiologists could not rely on amniotic fluid volume calculations, if there was not a clear visualization of an intact inner twin membrane. Accordingly, the court should reverse and remand for a new trial.

The court also abused its discretion in limiting Dr. Finberg's testimony to only 20 minutes on rebuttal. This trial lasted almost three weeks. The defense called three experts who all opined Inland's reliance upon the twin peak sign was within the standard of care. Twenty minutes is a patently insufficient amount of time for Dr. Finberg to have expressed his opinions and given the basis of those opinions. The court is respectfully requested to reverse and remand for a new trial.

The trial court erred in striking Professor Coffin as a rebuttal witness. She was prepared to testify as to what was taught to sonographers with respect to the identification of an inner twin membrane and assessment of amniotic fluid volumes on each side of the membrane. This was proper to rebut Inland's sonographers' testimony regarding their training in and application of the twin peak sign. The court erred in excluding Professor Coffin's proposed rebuttal testimony.

“When the trial court chooses one of the harsher remedies allowable under CR 37(b), it must be apparent from the record that the trial court explicitly considered whether a lesser sanction would probably have sufficed, and whether it found that the disobedient party's refusal to obey a discovery order was willful or

deliberate and substantially prejudiced the opponents ability to prepare for trial.”

Burnet v. Spokane Ambulance, 131 Wn. 2d 484, 494-97, 933 P.2d 1036 (1997).

In *Burnet*, the plaintiff served a supplemental answer to defendants’ interrogatories contending defendants were negligent in failing to properly review the physician’s credentials. In response to this supplemental answer, the defendants requested a protective order prohibiting discovery on the credentialing claim. The defendants argued the Burnets had not pled that cause of action. At the hearing on this motion, defendants’ attorney argued the Burnets earlier responses to written discovery led the defendants to believe the Burnets would present testimony with respect to the physicians treatment decisions; not with respect to the actions of the hospital in granting privileges to the doctors at issue. *Burnet*, 131 Wn.2d at 490-491. The trial court agreed. It ordered that no claim of corporate negligence regarding credentialing was at issue in the litigation and prohibited further discovery with respect to that issue. (*Id.* at 491). The trial court later granted the defendants’ motion for summary judgment on the plaintiff’s claims based on vicarious liability for the physician’s negligence. (*Id.*) The jury returned a defense verdict on the plaintiff’s remaining claim. (*Id.*) The Court of Appeals affirmed. (*Id.*) The Washington Supreme Court reversed.

A *Burnet* analysis is required when a trial court, as sanction for a discovery violation, refuses to allow the disobedient party to support or oppose designated claims or defenses, prohibits him from introducing designated matters into evidence, strikes pleadings or parts thereof, or dismisses an action or proceedings or any part thereof.

“In sum, the case law that the *Burnet* court relied on established that, *before* a trial court may impose a CR 37(b)(2)(B) sanction excluding testimony, a showing of willfulness was required; that, for “one of the harsher remedies allowable under CR 37(b),” the record must clearly state the reasons for the sanction, and that, for the “most severe” CR 37(b)(2)(C) sanction of dismissal or default, the record must show three things: the trial court’s consideration of a lesser sanction, the willfulness of the violation, and substantial prejudice arising from it. ... The *Burnet* court extended the test beyond the “most severe” sanctions of dismissal or withdrawal to encompass “the harsher remedies allowable under CR 37(b)” – a phrase that, at a minimum, means a CR 37(b)(2)(B) sanction excluding testimony, but that, more broadly, encompasses any and all sanctions described in CR 37(b)(2)(A) - (E).”

Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 688, 132 P.3d 115 (2006) (Emphasis added).

“We hold that the reference in *Burnet* to the “harsher remedies allowable *under* CR 37(b) applies to such remedies as dismissal, default, and the exclusion of testimony – sanctions that affect a party’s ability to present its case. ...”

(*Id.* at 690)

Before the trial court can exclude a witness as a sanction for the failure to comply with a discovery timetable, the court must consider, on the record, lesser sanctions. And the court must find that the disobedient party’s refusal to obey a discovery order was willful or deliberate and that it substantially prejudiced the opponent’s ability to prepare for trial.”

Teter v. Deck, 174 Wn.2d 207, 216-17, 274 P.3d 336 (2012); *Peluso v. Barton Auto Dealerships, Inc.*, 138 Wn. App. 65, 69-70, 155 P. 3d 978 (2007).

The presumption is late disclosed testimony will be admitted absent a willful violation, substantial prejudice to the non-violating party, and the insufficiency of sanctions less drastic than exclusion. *Jones v. City of Seattle*, 179 Wn. 2d 322, 343, 314 P.3d 380 (2013). (Emphasis added). In addition, each successive sanction order must be supported by the required *Burnet* findings. *Blair v. TA-Seattle E. No. 176*, 171 Wn.2d 342, 350-51, 254 P.3d 797 (2011).

In the case at bench, Pitts counsel's paralegal contacted Inland's counsel's office no less than a dozen times from February 28 through December 9, 2013 requesting deposition dates for their multiple experts. Once the deposition dates were finally scheduled, Pitts' counsel took depositions in Washington, California, and New York. Notably, Inland's expert Dr. Filly was deposed on November 13, 2013; Inland's expert Dr. Callen on November 14, 2013; and Inland's expert Dr. D'Alton on December 16, 2013. All three physicians testified for Inland at trial.

As a result of the information obtained in these depositions, Pitts' counsel served a second amended disclosure of expert witnesses on or about December 26, 2013 – eight days after Dr. D'Alton's deposition in

New York. The amended disclosure consisted of Harris Finberg, M.D. and Professor Carolyn T. Coffin. The amended disclosure was made after the date set for disclosure of Pitts' expert witness in the applicable case schedule order.

On January 6, 2014, Inland moved to exclude Dr. Finberg and Professor Coffin based upon late disclosure. On January 23, 2014, the court entered an order allowing the Pitts to designate Dr. Finberg and Professor Coffin as rebuttal witnesses; reserving for a later time whether rebuttal testimony would be allowed. Pitts were ordered to bear the cost of the video deposition of Dr. Finberg and any accelerated costs of transcription of Dr. Finberg's and Professor Coffin's depositions.

The trial court did not properly consider and apply *Burnet*. First, the court improperly articulated the standard to be whether Pitts' counsel engaged in excusable neglect. The correct standard under *Burnet* is whether counsel engaged in a willful violation of a discovery order. Under *Burnet* and its progeny, there is no basis to impose a discovery sanction affecting the Pitts' ability to present their case *unless* the court determines the discovery violation was willful. Here, the court never made that determination.

Secondly, the court incorrectly considered whether there was prejudice to Inland; not whether Inland was substantially prejudiced in

preparing for trial. Substantial prejudice in trial preparation is required by *Burnet, Teter and Peluso, supra*. Here, the record does not demonstrate the trial court found Inland was substantially prejudiced in trial preparation. Moreover, the finding of prejudice was based upon Inland's counsel's bare assertion, not on a declaration or other testimony from one of their three expert witnesses. For these reasons, the court did not properly consider and apply *Burnet*. It abused its discretion and the only appropriate remedy is to remand for a new trial.

On January 27, 2014, Inland brought a second motion – this time to strike or limit Pitts' expert Harris J. Finberg, M.D. On January 31, 2014 the court entered an order excluding Dr. Finberg from offering testimony that was cumulative of testimony presented during Pitts' case-in-chief; and excluding Dr. Finberg from offering testimony on any "late disclosed" or "undisclosed" liability theories including, but not limited to, stuck twin and IUGR. The court did not undertake, nor put on the record, a separate *Burnet* analysis with respect to this second order.

The January 31, 2014 order was an abuse of discretion. A separate *Burnet* analysis was required. *Blair, supra*. Here, the trial court did not engage in the required analysis. The court abused its discretion and the only appropriate remedy is to reverse and remand for a new trial.

On February 12 and 13, 2014, the court heard argument from

counsel for both parties regarding the scope of Dr. Finberg's testimony, if any: stuck twin; IUGR; and related subjects. The court was concerned by the late disclosure of Dr. Finberg by Pitts' counsel. The court did not consider the *Burnet* factors.

The topic of Dr. Finberg's proposed testimony was broached again on February 18, 2014. Inland's counsel was concerned about the "new" issues of stuck twin and IUGR. The Pitts' counsel argued these topics were part and parcel of explaining to the jury the undisputed existence of the membrane found on the demised twin at the time of her delivery. Again, the court did not engage in a *Burnet* analysis.

On February 19, 2014, the court heard argument on Pitts' motion to allow rebuttal testimony. This was the third formal motion the court heard with respect to Dr. Finberg's proposed testimony. Again, the court did not engage in a *Burnet* analysis but expressed displeasure with the late disclosure. On February 21, 2014, the court entered an order granting in part and denying in part Pitts' motion for rebuttal testimony of Harris Finberg, M.D. and Professor Carolyn Coffin. The order provided in pertinent part that: Professor Coffin was excluded from testimony; that Dr. Finberg could only testify on rebuttal for 20 minutes for Pitts and 20 minutes for Inland; the scope of Dr. Finberg's testimony was restricted to when the intertwin membrane was breached; and where he believed the

membrane collapsed, based upon the sonography. The court ruled he could not testify regarding the twin peak sign (except that he wrote an article on it), how thin or thick the membrane in this case was, IUGR, or his stuck twin theory.

The February 21, 2014 order was an abuse of discretion. A separate *Burnet* analysis was required for the third order. *Blair, supra*. Here, the trial court did not engage in the required analysis. The court abused its discretion and the only appropriate remedy is to reverse and remand for a new trial.

In summary, the defense brought two motions to strike, exclude or otherwise limit the testimony of the Pitts' experts, Dr. Finberg and Professor Coffin. These motions were based upon late disclosure in violation of the case schedule order. The January 31, 2014 order was particularly damaging to the Pitts' case in that it prohibited Dr. Finberg from testifying with respect to stuck twin and IUGR. These were subjects upon which he was an acknowledged expert and particularly well qualified to testify. Most importantly, his proposed testimony served to explain how Inland had misinterpreted the twin peak sign – a cornerstone of their defense. The record is clear the court did not undertake a separate *Burnet* analysis with respect to its January 31, 2014 order. Accordingly, the order of January 31, 2014, was an abuse of discretion and must be reversed.

In addition, the court misapplied the *Burnet* test with respect to its January 23, 2014, order. There, the court considered whether the Pitts' counsel's conduct constituted "excusable neglect." It is not clear from the record whether the court meant "willful violation" instead of "excusable neglect." If the court meant there was not a willful violation of the case schedule order, then there was no basis for any discovery sanction affecting the Pitts' ability to present their case. Moreover, since the court did not consider *substantial* prejudice to Inland in *preparing for trial*, the court abused its discretion and the only appropriate remedy is to reverse and remand for a new trial.

The present matter is similar to *Burnet*. In both cases, the court's action forced the plaintiff to abandon an argument essential to the presentation of their case. In *Burnet*, plaintiff was precluded from bringing a negligent credentialing claim. *Burnet*, 131 Wn.2d at 490-91. Here, the Pitts were prevented from attacking Inland's primary defense - the twin peak sign. Accordingly, the trial court abused its discretion and this court should remand for a new trial.

C. The Trial Court Erred When it Did Not Allow Dr. Finberg's Rebuttal Testimony by Audio-Video Conference.

On February 19th, after three formal hearings and additional discussion regarding Dr. Finberg's proposed testimony, the court ruled he

would only be able to testify in rebuttal for 20 minutes on a limited basis as described above. With respect to the delivery of his testimony, the court said:

“I am going to allow a teeny bit of testimony from Dr. Finberg ... and it is going to be *conditioned* on we have all the equipment to do it I am going to require that you [Pitts’ counsel] have equipment that shows both him [Dr. Finberg] and whatever it is he is looking at I respect the fact he [Dr. Finberg] has some issue and he cannot testify in the morning. *But I will be very upset with you, counsel, if at 1:30 in the afternoon and you have done your test and you have run it and everything is a go, and if it is not, we are done. We are done.* ... You will have the equipment, it will be set up, it will be ready to run, it will have been tested so we know how it works, which means somebody has to test it ... and I want to be able to say that we see both Dr. Finberg and we see whatever it is he is going to see up on the screen for the jury I expect you to be here tomorrow morning, no later than 10:00 to get everything set up and run ... to run it so you can see if it actually works ... because I will not permit him to testify without everything being in place and working.”

(RP filed 11/3/14, hearing 2/19/14, p. 632-635; CP 1502-1504) (emphasis added).

Accordingly, Dr. Finberg was scheduled to testify remotely by audio-video conference at 1:30 p.m. on February 20, 2014. He was the only witness scheduled to testify that day. Pitts’ counsel set up the equipment in the courtroom. The equipment was working. As of 12:00 noon, only a minor adjustment was needed to refine the video presentation: specifically, the relative sizing of the evidence panel which was being adjusted manually. At approximately 12:00 noon, the judicial

assistant informed Pitts' counsel that Dr. Finberg would not be allowed to testify that afternoon. It is not clear in the record upon what basis the court ruled; or if the court, and not the judicial assistant, made the decision.

The conditions established by the court on February 19, 2014 had been met. The witness, the questioning attorney, and the evidence could be displayed. Dr. Finberg had a laptop computer which could control Pitts' counsel's laptop and therefore, the display of the evidence in the courtroom. The only outstanding issue was the relative sizing of the evidence panel which was being adjusted manually. The video conference technical support person was advising Pitts' counsel where the proper adjustment could be made from the menu on the software program. Pitts' counsel was adjusting it when the judicial assistant informed him that Dr. Finberg would not be allowed to testify.

The court touched upon this issue in the hearing on the Pitts' motion for a new trial. There, the court said, "so if the jury was going to understand anything Dr. Finberg was going to say, they had to have that ability to both see him and see what he was looking at so that that testimony would be helpful for them." (RP filed 11/3/14, hearing 4/25/14, p. 662). The implication is that as of 1:30 on February 20th, the jury couldn't see both Dr. Finberg and the exhibit he was working with. That

is incorrect, for the reasons explained above.

In addition, neither the court's written order nor its February 19th oral ruling required the equipment be perfected by 12:00 noon. To the contrary, the court said, "But I will be very upset with you, counsel, if at 1:30 in the afternoon and you have done your test, you have run it and everything is a go, and if it is not, we are done. We are done." (RP filed 11/3/14, hearing 2/19/14, p. 633) (emphasis added).

As demonstrated above, Pitts' counsel was not afforded the opportunity to perfect the equipment in accordance with the court's February 19th ruling and February 21st order. Based on these circumstances, the court abused its discretion in foreclosing Dr. Finberg's testimony. This court is requested to reverse and remand the case for a new trial.

D. The Trial Court Erred in Allowing Inland to Present Cumulative and Speculative Expert Testimony Which Was Not Helpful to the Trier of Fact.

Generally, expert testimony is admissible if: the expert is qualified, the expert relies on generally accepted theories in the scientific community; and the testimony would be helpful to the trier of fact. *Johnston-Forbes v. Matsunaga*, 181 Wn. 2d 346, 352, 333 P.3d 388 (2014). Trial courts are afforded wide discretion and trial court expert

opinion decisions will not be disturbed on appeal absent an abuse of discretion. (*Id.*) A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *Teter v. Deck*, 174 Wn. 2d 207, 215, 274 P. 3d 336 (2012). Where there is no basis for the expert opinion other than theoretical speculation, the expert testimony should be excluded. *Queen City Farms v. Central Natl. Ins. Co.*, 126 Wn.2d 50, 102-103, 882 P.2d 703 (1994). In the present case, the trial court abused its discretion when it allowed Inland to present cumulative and speculative expert testimony which was not helpful to the trier of fact.

On March 1, 2013, Pitts' counsel moved to limit cumulative expert testimony anticipated from the defense. The court denied the motion as premature. On January 7, 2014 Pitts' counsel again moved to limit the defense's multiple expert witnesses. The court determined: Mary D'Alton, M.D. could testify with respect to causation and standard of care; Peter Callen, M.D., could testify as to standard of care; and Roy Filly, M.D., could testify as to causation. (CP 948-49). At trial, consistent with the order, all three experts testified Inland met the standard of care. However, contrary to this order, *all three* also testified as to causation.

Dr. D'Alton testified with respect to causation:

“Q. Do you have an opinion about whether this was a “Di-Di

twin pregnancy or a Mono-Di, diamniotic pregnancy? ...

- A. I don't know what it was, I really don't know because it is very confusing to me ... I don't know which one of those it was. I feel there was a rupture of the membranes, but I can't sit here today, based upon everything we know, and say which one of those it was. ...

(RP filed 11/14/14, hearing 2/18/14, p. 342-343).

On cross examination, Dr. D'Alton opined:

- Q. ... is it your statement today that you agree with Drs. Filly and Callen that this was a synechiaie and there was not - was not a true twin peak sign?

- A. No, no, no, no, no. What I said was ... that I cannot rule out their interpretation. They made a very compelling case that this was an intrauterine synechiaie in a mono amniotic twin pregnancy. I personally, even after all I have seen and published on twin pregnancies, have never heard about this in a twin pregnancy. I, therefore, never entertained that diagnosis. So I feel, more likely than not, this was a rupture of membranes, But I cannot rule out their opinion ... that this was an intrauterine synechiaie in a mono amniotic twin pregnancy. *But to my knowledge, it has never been reported before.*"

(RP filed 11/3/14, hearing 2/18/14, p. 515-516)(Emphasis added).

Dr. Filly also testified with respect to causation:

- "Q. Could you tell the jurors what your causation theory is in this case?

- A. Yes. It's my belief that the events that led to the tragic accident involving Ms. Pitts pregnancy, is that there were - there are, two things, I think, that all of the experts that have testified before you have agreed on. No. 1 is the Pitts pregnancy was actually a mono chorionic pregnancy, so in

other words, there was one placenta shared by two fetuses. And that at the end of the pregnancy, for whatever reason it happened, it was functionally a mono-amniotic pregnancy. So the fetuses were sharing the same cavity. ... It is my opinion that Ms. Pitts' pregnancy was complicated by an entity called a synechia and was ever and always a mono chorionic mono amniotic pregnancy with this structure in it that unfortunately is almost perfectly designed to cause confusion."

(RP filed 11/14/14, hearing 2/19/14, p. 472-473).

With respect to synechia, Dr. Filly testified:

"Q. Now you told us you believe a synechia in terms of reasonable medical probability is what complicated Ms. Pitts' pregnancy, yes?

A. Yes."

(RP filed 11/14/14, hearing 2/19/14, p. 481).

Dr. Filly further testified that synechia was a scar. (*Id.* at p. 483).

He thought this was an instance where the twin peak sign was misleading.

"Now as I have said, in my theory of the case, Mrs. Pitts' pregnancy had the synechia. The synechia membrane has four layers, just like the intra twin membrane of twins that each have their own placenta. The yellow two layers of amnion, yellow layer of amnion and two layers of chorion which means that in Mrs. Pitt's pregnancy, it was possible for the placenta to grow into the synechia as a twin peak sign. So this would be an instance where the twin peak sign misleads you to the wrong diagnosis instead of leading you to the correct diagnosis."

(*Id.* at 486-487)

Finally, contrary to the court's order, Dr. Callen testified on direct examination as to causation. (RP filed 11/14/14, hearing 2/18/14, p. 405-

407; 409). On cross examination, he testified Mrs. Pitt's pregnancy was monochorionic/diamniotic with synechiaie looking like a twin peak sign. (RP filed 11/3/14, hearing 2/18/14, p. 528-29).

As demonstrated above, Inland's expert testimony was cumulative. Contrary to the court's January 23, 2014 order (CP 948-49), the jury heard from all three defense witnesses with respect to causation. Therefore, their testimony was cumulative with respect to the subject matter. In addition, Drs. Filly and Callen's testimony was cumulative as to substance. They both testified Mrs. Pitts' pregnancy was complicated by the presence of synechiaie masquerading as a twin peak sign. This served to overly emphasize Inland's theory of the case and is exactly what the Pitts attempted to avoid through their March, 2013 and January, 2014 motions to limit the number of defense experts.

Dr. Filly's synechiaie theory was speculative. It was based on a single paper written by a Dr. Tuuli. (RP filed 11/14/14, hearing 2/19/14, p. 469-470, 494-495). Dr. Tuuli estimated the likelihood of observing a synechiaie in pregnancy at about 1 chance in 200. (*Id.* at 494-495). The record does not indicate if Dr. Tuuli's paper was peer reviewed, generally accepted in the scientific community, based on a case history, or simply a novel theory. Dr. D'Alton testified the synechiaie theory had *never been reported before*. (RP filed 11/3/14, hearing 2/18/14, p. 515-516). The Pitts

query whether expert opinions with respect to an event so speculative can possibly be helpful to the jury, as required under ER 702.

As demonstrated above, the court abused its discretion. The synechia theory was cumulative, speculative and therefore not helpful to the jury. It was manifestly unreasonable for the trial court to allow it to go to the jury. This court should reverse the judgment and remand the case for a new trial.

E. The Trial Court Erred When it Denied the Pitts' Request to Voir Dire Inland's Expert Physician Mary D'Alton Outside the Presence of the Jury as an Offer of Proof Inland Would Not Be Prejudiced By Testimony of IUGR and Stuck Twin.

Prior to Dr. D'Alton's February 18, 2014, testimony, Pitts' counsel requested to *voir dire* her outside the presence of the jury. The court ruled he would have to do that during cross-examination. In accordance with that ruling, Pitts' counsel attempted to *voir dire* Dr. D'Alton prior to cross. Defense counsel objected and the court sustained. The basis of the court's ruling was the January 31, 2014 order excluding the issues of IUGR and stuck twin.

Subsequently, Pitts' counsel explained the basis for the request to *voir dire* Dr. D'Alton:

“... when the twin was delivered, there was a membrane collapsed around it. If we can't discuss how the membrane collapsed around it without trying to say that it is a certain type of affliction or

certain type of result, I mean, I don't see how we can present the case when something at the top of the differential diagnosis would be stuck twin ... or growth restriction which results in polyhydramnios, oligohydramnios, or no fluid around the membrane What I wanted to do was *voir dire* Dr. D'Alton outside the presence of the jury and I think she would have said, "Well, no, it is part of the differential diagnosis." It wasn't a new concept. ... The issue is what can Dr. Finberg respond to. He's a twin peak expert ... he identifies where the membrane is at certain times of the pregnancy that is different from what they are saying. He thinks some of the membrane is what is called an amniotic flap or wrinkle, but if he can't talk about the fact that the membrane is collapsed around the baby, whether or not he talks about stuck twin or a twin-to-twin transfusion syndrome, it is a physical finding and I don't know how we can deal with it. I mean, the most important fact is the membrane was adhered to the twin, the fetus, when it was delivered and nobody is going to tell the jury how that might have happened. **Dr. D'Alton was very careful not to talk about how it happened because she couldn't explain it ... how it relates to a tear in – a spontaneous tear in the membrane. She couldn't explain how that would result. There is a physical explanation for it and that is dehydration of one amnion that results in the membrane around it. ...**"

(RP filed 11/14/14, hearing February 18, 2014, p. 352-354) (emphasis added).

The court erred in several respects. First, as argued above, the court did not engage in a separate *Burnet* analysis before entering the January 31 and February 21, 2014 orders. Secondly, the offer of proof was proper to show that twin-to-twin transfusion and "stuck twin" were not "new" and prejudicial issues to the defense because they were part of a standard differential diagnosis. Pitts counsel was not allowed to *voir dire* Dr. D'Alton regarding cause of death. (See Appendices Para. 6).

Finally, “stuck twin” and “twin-to-twin” transfusion syndrome were part and parcel of Dr. Finberg’s proposed rebuttal testimony, as argued above. Accordingly, the court is requested to reverse the trial court and remand for a new trial.

F. The Trial Court Erred When it Allowed Inland’s Counsel to Cross-Examine Dr. Patten About the Twin Peak Signs.

Here, the subject matter of Dr. Patten’s direct testimony, the Pitts’ expert, included measurement of membrane thickness and counting membrane layers. It did not include the twin peak sign. Even if cross-examination as to his opinion of the twin peak sign was within the scope of direct, questions should have only been allowed as to his personal knowledge, use of, and experience with the twin peak sign. He was admitted by Inland’s counsel not to be a twin peak expert, but he was essentially drafted by Inland’s counsel as a subordinate defense expert when required to read from and comment on twin peak references from the Callen text excerpt. Further, it was apparently the court’s intent to allow this testimony as sufficient to rebut any twin peak testimony given by Inland’s experts, after Dr. Patten’s time of testimony and availability, so as to provide support to restricting Dr. Finberg from doing so. This violates the letter and intent of ER 611 which states the scope of cross examination should only be limited to the subject matter of the direct

examination and matters affecting the credibility of the witness. The court could permit inquiry into additional matters at its discretion. (See Appendices para. 7).

Finally, Dr. Patten's twin peak testimony, for the most part, violates ER 701-703 on expert testimony. He is in a position of an expert testifying outside his admitted area of expertise. How can this be helpful to the jury. Most of his testimony was replicated by Inland's experts, and was cumulative.

G. The Trial Court Erred When it Granted Inland's Motion for Partial Summary Judgment Dismissing the Pitts' Loss of a Chance Claim.

Summary judgment is reviewed de novo. The appellate court engages in the same inquiry as the trial court. *City of Sequim v. Malkasian*, 157 Wn. 2d 251, 261, 138 P. 3d 943 (2006). Summary judgment is appropriate when, viewing the facts in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *LaCoursiere v. Camwest Dev., Inc.* 181 Wn. 2d 734, 740, 339 P.3d 963 (2014).

In the case at bench, the Pitts' expert, Dr. Patten testified with respect to loss of a chance: "Based on the literature, I believe that there was a decreased chance of survivability without this knowledge being imparted to the obstetrician. Statistically the twins would have survived, according to this literature. And that is basically all I can say, is that based

on statistics, based on what Dr. Hardy said he would do, statistically there would be a better outcome.” (RP filed 11/3/14, hearing 2/10/14, p. 289). The trial court struck this testimony based upon its earlier ruling granting Inland’s motion for partial summary judgment dismissing the loss of a chance claim.

Washington first recognized a claim for loss of a chance in *Herskovits v. Group Health Coop.*, 99 Wn.2d 609, 664 P.2d 474 (1983). *Herskovits* involved a wrongful death and survival action based on a healthcare provider’s failure to diagnose and treat. (*Id.* at p. 611). The plaintiff claimed the decedent incurred a loss of chance of survival. (*Id.* at p. 612). Defendant moved for summary judgment, and the plaintiff responded with evidence that the alleged negligence left the decedent with a decreased five year survival probability. (*Id.* at p. 610-11). There was no dispute the decedent’s five year survivability never exceeded 50%. (*Id.*) The trial court granted summary judgment and the plaintiff appealed. (*Id.*) The Supreme Court reversed and remanded the matter for trial.

Percentage or range of percentage evidence as to the degree of the lost chance is unnecessary. The lead opinion by Justice Dore utilized a substantial factor causation analysis wherein a loss of chance claim could survive even if there was less than a 50% chance the defendant’s negligence caused the ultimate harm. (*Id.* at 614). The concurring opinion

by Justice Pearson agreed that negligent healthcare providers should be at risk if they cause a loss of chance, but concluded the loss of a chance was a separate harm. (*Id.* at 624). Justice Pearson wrote:

“Therefore, I would hold that plaintiff has established a prima facie issue of proximate cause by producing testimony that defendant probably caused a substantial reduction in Mr. Herskovits’ chance of survival.”

Herskovits, 99 Wn.2d at 634.

In 2011, the Washington Supreme Court adopted Justice Pearson’s plurality opinion.

“We hold that *Herskovits* applies to lost chance claims where the ultimate harm is some serious injury short of death. We also formally adopt the reasoning of a *Herskovits* plurality. Under this formulation, a plaintiff bears the burden to prove duty, breach, and that such breach of duty proximately caused a loss of chance of a better outcome. This reasoning of the *Herskovits* plurality has largely withstood many of the concerns about the doctrine, particularly because it does not prescribe the specific manner of proving causation in lost chance cases. Rather, it relies on established tort theories of causation, without applying a particular causation test to *all* lost chance cases. Instead, the loss of a chance is the compensable injury.”

Mohr v. Grantham, 172 Wn.2d 844, 857, 262 P.3d 490 (2011).

With respect to damages, the court wrote:

“Treating the loss of a chance as the cognizable injury permits plaintiffs to recover for the loss of an opportunity for a better outcome; an interest that we agree should be compensable, while providing for the proper valuation of such an interest. *Lord v. Lovett*, 146 N.H. 232, 236, 770 A.2d 1103 (2001) ...”

Mohr, 172 Wn.2d at 858.

The court's reliance on *Lord v. Lovett* demonstrates that percentage or range of percentage evidence as to the degree of the lost chance is unnecessary. In that case, there was no opinion evidence as to the percentage or range of percentage reduction in the loss of a chance. The plaintiff suffered a broken neck in an automobile accident. She alleged defendant's negligently misdiagnosed her spinal cord injury, failed to immobilize her properly, failed to administer proper steroid therapy and thereby caused her to lose the opportunity of a substantially better recovery. *Lord v. Lovett*, 146 N.H. 232, 233; 770 A.2d 1103, 1104 (2001). Defendant intended to move for dismissal at the close of the plaintiff's case. The trial court permitted the plaintiff to make a pre-trial offer of proof. The plaintiff proffered that her expert would testify defendant's negligence deprived her of the opportunity for a substantially better recovery. However, the *plaintiff's expert could not quantify the degree to which she was deprived of a better recovery by defendant's negligence*. (770 A.2d at 1104) (emphasis added). The trial court dismissed the plaintiff's action and the Supreme Court of New Hampshire reversed. (*Id.*)

The court first examined which approach to take in recognizing a loss of a chance. Specifically, the court considered the traditional tort

approach wherein a plaintiff must prove, as a result of the defendant's negligence, the plaintiff was deprived of at least a 51 percent chance of a more favorable outcome than actually obtained. (*Id.* at 1105). The second approach the court considered was to relax the standard of proof of causation. Under this approach, the patient would not be precluded from recovering simply because her chance of a better recovery was less than 51 percent. If she could prove the defendant's negligence increased her risk of harm to some degree (the precise degree varying by jurisdiction), her cause of action would survive. (*Id.*) Under the third and final approach considered by the court, the loss of a chance for a better outcome was itself the injury for which the negligently injured person may recover. (*Id.* at 1105-06). This is the approach the New Hampshire court adopted, as the Washington Supreme Court did in *Mohr*. 172 Wn.2d at 857.

Turning to damages, the New Hampshire court addressed defendant's contention a loss of a chance injury is intangible and not amenable to damages calculation.

"First, we fail to see the logic in denying an injured plaintiff recovery against a physician for the lost opportunity of a better outcome on the basis that the alleged injury is too difficult to calculate, when the physician's own conduct has caused the difficulty. Second, we have long held that difficulty in calculating damages is not a sufficient reason to deny recovery to an injured party. Third, loss of opportunity is not inherently unquantifiable. A loss of opportunity plaintiff must provide the jury with a basis upon which to distinguish that portion of her injury caused by the

defendant's negligence from the portion resulting from the underlying injury. This can be done through expert testimony just as it is in aggravation of pre-existing injury cases.”

Lord v. Lovett, 146 N.H. 232, 239; 770 A.2d 1103, 1108 (2001) (internal citations omitted).

In the present case, Dr. Patten's testimony quoted above complies with *Mohr and Lord*. It is based upon literature analyzing survivability and applied to the Pitts' case by what Dr. Hardy (the Pitts' treating OB-GYN) testified he would do. This is precisely what *Mohr* required. The trial court erred when it dismissed the loss of a chance claim and struck Dr. Patten's testimony. The court should reverse the judgment and remand the case for trial.

The Washington Supreme Court's opinion in *Grove v. PeaceHealth St. Joseph Hosp.*, 182 Wn. 2d 136, 341 P3d 261 (2014), supports the Pitts' argument in this case. There, two experts testified for the plaintiff during a medical malpractice trial. Neither expert testified as to a percentage or range of percentage reduction in the chance of survival. Dr. Ghidella opined that Grove would not have suffered permanent injuries or would have had a better outcome if the standard of care had been met. (*Id.* at 140-141). Dr. Adams's testified if the hospital employees had not breached the standard of care, Grove would have had a better chance of avoiding injury or would have suffered less severe injury. (*Id.* at

142). Although the primary issue decided by the court was whether the trial court properly granted defendant's motion for judgment as a matter of law, (*Id.*) at 138, the experts' testimony as to loss of a chance absent percentages strongly supports the Pitts' argument in the case at bar.

Finally, this issue has been decided. In *Mohr v. Grantham*, loss of chance for Mrs. Mohr was as high as 60%:

Mrs. Mohr and her husband filed suit, claiming that Mrs. Mohr received negligent treatment, far below the recognized standard of care. They argue that the doctors' negligence substantially diminished her chance of recovery and that, with nonnegligent care, her disability could have been lessened or altogether avoided. The Mohrs' claim relies, at least in part, on a medical malpractice cause of action for the loss of a chance. In support of their claim, the Mohrs presented the family's testimony, including her two sons who are doctors, and the testimony of two other doctors, Kyra Becker and A. Basil Harris. The testimony included expert opinions that the treatment Mrs. Mohr received violated standards of care and that, ***had Mrs. Mohr received nonnegligent treatment at various points between August 31 and September 1, 2004, she would have had a 50 to 60 percent chance of a better outcome.*** The better outcome would have been no disability or, at least, significantly less disability.

Mohr v. Grantham, 172 Wn.2d 844, 849, 262 P.3d 490 (Wash. 2011) Emphasis added)

VI. CONCLUSION

In pretrial and trial motion practice, the court made several written orders and oral rulings wherein it incorrectly applied (or did not apply at all) the test required by *Burnet v. Spokane Ambulance*, 131 Wn. 2d 484, 933 P.2d 1036 (1997) and its progeny. These errors prevented the Pitts

from presenting their case. They constitute an abuse of discretion and require reversal of the judgment and a new trial.

In addition, the court set certain conditions for Dr. Finberg's limited rebuttal testimony through live audio/video conferencing; and then did not allow Pitts' counsel to meet those conditions within the time frame prescribed by the court. This was an abuse of discretion which must be reversed. Moreover, in stark contrast to the severe limitations the court imposed on the Pitts' ability to present its case through the use of Dr. Finberg, it improperly allowed the defense to present cumulative, speculative expert testimony with respect to causation. This testimony was not helpful to the trier of fact and was an abuse of discretion.

Finally, the court dismissed the Pitts' loss of a chance claim contrary to *Herskovits v. Group Health Coop.*, 99 Wn. 2d 609, 664 P.2d 474 (1983) and *Mohr v. Grantham*, 172 Wn.2d 844, 262 P.3d 490 (2011). For all these reasons, this court is requested to reverse the judgment and remand the case for a new trial.

RESPECTFULLY SUBMITTED this 5th day of July, 2016.

MICHAEL J RICCELLI PS

By: 
Michael J. Riccelli, WSBA #7492
Attorney for Appellant

DECLARATION OF SERVICE

I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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

July 5, 2016
Date

Holly Eastwood
Signed

APPENDICES

1. TTTS is a condition which results in amniotic fluid volume and pressure increasing in one twin's amnion while it decreases in the other twin's amnion. Sometimes this results in the decreased volume twin being plastered or stuck against the uterine wall. This is referred to as "stuck twin." A somewhat similar condition can occur with IUGR, but in IUGR there is no significant increase in the amniotic fluid volume or pressure with one twin, while there is a decrease in fluid and pressure with the other twin. This can result in the amniotic membrane being layered over the one twin, but not having the twin plastered or stuck to the wall of the uterus by the pressure of the other twin's amnion. This is referred to on page 2.
2. Cross examination of Dr. Patten by Inland's counsel, Mr. Hart, with the blessing of the court, and over Pitts' counsel's objection, wherein Dr. Patten was co-opted as an expert on the twin peak sign, referred to on page 18:

BY MR. HART:

Q. Would you verify that in Dr. Callen's book that you referred to as the Bible, it starts off with the part that you read about chorionicity and placentation on page 272?

A. Where do you want me to start, sir?

Q. I want you to confirm. We don't need to do that. Page 272 is

what you read, probably seems like forever but it was before I got up here and started asking questions. Did you start by reading this highlighted portion on page 272?

A. That was one of the things that I read, yes, sir.

Q. Did you start there?

A. It's been awhile. I don't remember.

Q. Okay. Go to 273, please.

A. Okay.

Q. Did you read this about the second and third trimesters?

A. I don't believe so, no.

Q. Did you skip over this one altogether where it says "twin peak sign" on page 273?

A. I wasn't asked to read that, I didn't skip over it.

Q. Well, was it skipped over in your presentation.

MR. RICCELLI: Object to the form of the question.

THE COURT: Sustained, it's argumentative.

BY MR. HART:

Q. All right. Did you reference anything about this second section called twin peak sign on page 273?

A. Did I reference anything about it? No.

Q. Let's go to page 274.

MR. RICCELLI: Your Honor, I'm gonna object to the continuing line of questioning. He's trying to make our expert his expert witness by default. We didn't cover the twin peak sign on direct.

THE COURT: Counsel, objection overruled. You may proceed.

BY MR. HART:

Q. Can we agree this is the rest of the twin peak sign information, and you did read this about membrane thickness?

A. I believe that's correct, yes.

Q. All right. And then page 275 read quickly. You read this right here, am I right? Where it's highlighted under "membrane layers."

A. I don't believe so, no.

Q. Can you blow up this from page 275 of Dr. Callen's book. So I just wanted to -- Dr. Patten, I just wanted to indicate to the jurors where everything was in Dr. Callen's layout of his book.

A. Okay.

Q. Now I want you to look at page 275. If you can see it better there or you can look at this, if you like. Would you read what he says in his diagrams and illustrations from "other patients ultrasounds" on page 275.

A. So you'd like me to read figure 8-14?

Q. Please.

A. It says, "A, the Lambda or twin peak sign is demonstrated by the thicker placental membranes which widen as they touch down on the chorionic plate, indicating a fused dichorionic diamniotic placenta." Want me to keep going?

Q. Yeah. What is that right there?

A. I can't see it.

Q. It's whatever's before "in cases." A. B.

Q. So A is what? Is that showing -- to your reading of this, this arrow is showing where the thick membrane goes into a twin peak sign or Lambda sign?

A. Right, that's what's being illustrated, that there's a thick membrane and that there's a twin peak sign.

(RP filed 11/14/14, p 280-283)

3. Text edited by Dr. Callen referred to on page 19:

“Monoamniotic Twins

When the dividing membrane is not seen early in the ultrasound evaluation of a twin pregnancy, the diagnosis of monochorionic-monoamniotic twins should be considered. This occurs in approximately 1% of all monochorionic twins. We require several examinations to search for the dividing membrane before making this diagnosis, because the membrane may not initially be apparent by ultrasound. *Distinguishing monochorionic-monoamniotic twins from a “stuck” twin in an oligo-hydramniotic sac can be difficult.* Normal amniotic fluid volume and two free-floating twins with no visualized membrane separating them should clinch the diagnosis of monochorionic-monoamniotic twins. Visualization of two cord insertions into the chorionic plate of the placenta in very close proximity to one another is also suggestive of monochorionic-monoamniotic twins.”

(Peter W. Callen, Ed., *Ultrasonography in Obstetrics and Gynecology*, 8th Edition) (CP 326)

4. Dr. Hardy, the Pitts' OB/GYN, testified as follows as referred to on page 19:

BY MR. RICCELLI

Q. Okay. Now before we get into that, what is the difference, then, in the consideration of a di di pregnancy and a mono di pregnancy, a monochorionic diamniotic pregnancy, with respect to the

distribution of amniotic fluid between the sacs? *What concerns might be different in a mono di pregnancy than a di di pregnancy with the distribution of Amniotic fluid?*

A. *I think the primary thing, again, is the twin twin transfusion. Because if you've got blood all shunted to one baby, he's gonna make -- that child's gonna make more urine, there's gonna be extra fluid around that child. And the other baby won't get as much fluid and won't make as much urine, and consequently the fluid will be more contracted. In severe cases that are late in diagnosis of twin twin transfusion, the one baby can look like it's just stuck to the side where you can't find any fluid around it at all and the other sac will have an abundance of fluid.*

(RP filed 11/3/14, hearing 4/25/14, p. 442).

Q. Review your notes and just describe to the jury how the procedure went and what you observed.

A. I'm not gonna read it to you, but as we opened the uterus, there was a sac that seemed to have some bloody fluid in it. We ruptured that and we delivered a live baby. *It was noticed at that time that the -- there was no more fluid left around the deceased baby, and it appeared to me that there was a membrane kind of covering it.* And we peeled through that and you could see where the umbilical cords that were traversing that membrane and then they were -- and I described it all in detail, they were twisted and tangled. And one went through the other. And then there was a tight twist beyond that and some thrombosis in that band, giving me the impression that this was a cord accident that had caused the death.

(RP filed 11/3/14, hearing 4/25/14, p. 480).

5. Concerning the court's decision to not allow Dr. Finberg's testimony concerning the twin peak sign, as referred to on page 20:

“THE COURT: All right. What can he say? Number one he can identify himself. Write it down because this is what is going to happen. I will write it down, too. Number two, he can do like the other experts have done; his curriculum vitae, articles that he's written, his educational background, the same things that the other

experts have been allowed to do. *What he will not be asked to do is to talk about the twin peak. That is not rebutting anything, we have had all kinds of discussions about that. We do not need another discussion about it.* So he will not be -- he can identify himself -- he has been identified by the other experts as somebody who wrote the original article, he can identify himself. That is about all we are going to say about him, other than that his CV indicates maybe other articles that he's written. With regard to what he can say. I think at this point the only thing he has to add to the mix was whether or not his opinion about whether or not the membrane was breached spontaneously. It is really interesting because I thought -- well, Dr. D'Alton said that. And it seemed to me that I already knew that was her theory and that the other doctor's was the synechia, Filly's was the synechia theory. That will be the only thing he can testify about. It is my understanding that he is going to use -- and by the way, these are the digital ones, correct, not the VHS? These are the digital ones, correct?

MR. RICCELLI: There's --

THE COURT: Digital. I am insisting he use the digital.

MR. RICCELLI: I am not clear as to the breadth of his testimony. You say he can only provide the opinion the membrane was not breached spontaneously, but does that allow him to locate, on the images, where the membrane is and what time

THE COURT: Well that's what you have represented he is going to do.

MR. RICCELLI: Well, that's within the context of what you're ruling.

THE COURT: Yes, that is what he is going to do. My statement is I want him to use the digitized image, I do not want to get confused with any other images, which everybody has. It is interesting because -- well never mind. He is going to identify on -- I take it he is going to identify on a series of images when he could see it and then when he didn't see it any more? The interesting thing is, is this theory that he can see a collapsed membrane or he just does not see the membrane?

MR. RICCELLI: No. I don't know if you looked at the PowerPoints that we provided you with, but he shows where the membrane is on the twin, where it's stretching between the twin and the body or the feet. Basically you can see the membrane on the twin, collapsed on the twin.

MS. MOORE: Stuck twin.

MR. RICCELLI: Stuck twin refers to the fluid of the other -- of the healthy amnion pressing the other twin up against the wall.

THE COURT: The issue for me -- I already said you cannot talk about stuck twin. The issue here is, to me, is I assume he is saying there is a breach of the standard of care because he could not see that the membrane had collapsed. That is all you are going there with, okay? That is all you are going to go there with, is that the membrane had collapsed. We do not need to go into any more detail than that. I presume he is going to say that is a breach of the standard of care, he couldn't see it.

MR. RICCELLI: It is a breach of the standard of care that they didn't identify that.

THE COURT: You did not identify. But that is it. That is all you are going to get. here you see the membrane. Ultrasound number three, here you don't see the membrane. Ultrasound number four, here you see it on the fetus. I mean, I will allow that to occur for purposes of the standard of care issue because that is rebutting the testimony with regard to -- well, it is rebutting the testimony that the membrane collapsed after December 21st. Well, the assumption is that there is a membrane up until -- D'Alton's testimony is there is an assumption until December 21st, at least, the membrane is intact. But he is testifying, apparently, that is not the case, they should have observed that the membrane had collapsed. My first thought is, well, they still saw heartbeats, they still saw live babies, etc. That is really all I am going to allow him to say. We are not going into theories and that is it. Is he going to go through each of the ultrasounds?

MR. RICCELLI: I'm not sure that every ultrasound has the image

that shows what he's trying to show, but some, two or three of them do. I have to ask him that. I'm not sure how many, but I know he can.

THE COURT: That is what I am going to allow and that is it.

MR. HART: So, you know, we are always afraid of what that is going to turn in to be, you know, because it looks like we're defending OJ.

THE COURT: Counsel, I appreciate that. Believe me, it is not always easy. Sometimes I think I should change my robe to black and white stripes because that is what my role is here, I am a referee and a gatekeeper. And I already told Mr. Riccelli what I think about the fact that he has put us all in this position by waiting until the last minute to develop Dr. Finberg, who probably should have been in the case two or three years ago, but that is beside the point. All right? At this point, you are free to object and I appreciate that. If Dr. Finberg -- I have no idea. I have never seen him. I don't know if he is one of these witnesses that you say good morning and then boom, he is off, he will talk to you for 20 minutes before you can stop him. *Because rebuttal is very short, I am expecting less than 20 minutes between everybody with him, and he's off and he's done.* And I expect him to be on time, too, because I am starting at 1:30. If he is not here we will go into closings, and if does not work we will go into closings. So this all might be academic.

MR. HART: Paranoid older guy. He can ask him -- it isn't -- he's already decided -- I haven't figured out what he wants to show. It's what you're gonna let him show.

THE COURT: That's right.

MR. HART: The question is, "Here's October 5th. Do you see that the membrane is there or is it gone?"

THE COURT: Well, I think the real issue, if I understand it correctly, because there are probably some you cannot see the membrane on and it is there. The question is can he identify where it is actually. There has been some tear in the membrane and it is

collapsed. On one of the cine loops or on one of the ultrasounds.

MR. RICCELLI: Well your Honor, if I may. I don't know that he's gonna say there was a tear or not, he's just gonna say the membrane's here and it wasn't in -- it wasn't there to be torn.

THE COURT: No. The representation to me is he is going to say that at some point this membrane --

MR. RICCELLI: Collapsed.

THE COURT: And he will locate it in the membrane in various images beginning October 2007 and as collapsing.

MR. RICCELLI: Yes.

THE COURT: All right. So you have represented to me -- it is not that he is just going to locate the membrane. If that was all, that is not rebuttal, we have done plenty of that. He is going to locate, on the ultrasound, pictures where the membrane is collapsing. It may be partially collapsed, I guess, in one and totally collapsed in another, I don't know. That's what I'm looking for. If he cannot do that, then we are done. Then we are done, we are not going to have his testimony.

MR. HART: Last clarification. You know how we are. I'd give you a whistle if I could right now, your Honor.

THE COURT: Time out. Time out.

MR. HART: Does he get to say it's collapsed onto a fetus, like Mr. Riccelli always does with the implication of stuck twin? Or does he just -- I mean --

THE COURT: The jury doesn't know anything about stuck twin.

MR. HART: I know.

THE COURT: And you know, counsel, when the fetus was born, the membrane was around the fetus. That is undisputed. So trying to split those hairs, I think, is not -- that is more like hiding the ball

than it is trying -- because nobody is going to argue stuck twin, are we? Nobody is going to argue whatever that is too much fluid, not enough fluid, intrauterine growth problems. Nobody's going to argue any of that, it is not going to happen. So they do not really know all of that. But they did know, from Dr. Hardy, that when the baby was born, there was a membrane over the baby. They know that. You will just have to live with that, counsel.

MR. HART: The PowerPoint is 40 pages long.

THE COURT: He is not doing a PowerPoint. There is no PowerPoint here. I have no PowerPoint. He can talk about his -- there will be no PowerPoint. He can talk about his background and he can do the work with the images no PowerPoint."

(CP 1502-1504; RP filed 11/3/14, hearing 2/19/14, p. 630-644).

6. The court did not engage in a separate *Burnet* analysis before entering the January 31 and February 21, 2014 orders. Secondly, the offer of proof was proper to show that twin-to-twin transfusion and "stuck twin" were not "new" and prejudicial issues to the defense because they were part of a standard differential diagnosis. The following is referred to on page 46:

"Q. Now, you just testified that you had some theory of the cause of the death of the child, of the fetus; correct?

A. Yes.

Q. When a fetus is born -- let's go to Dr. Hardy's report. Did you read Dr. Hardy's report when you first received the case?

A. Which report of Dr. Hardy.

Q. The one delivering, the OB-GYN.

A. The operative report, yes, I did.

Q. The operative report.

A. Yes.

Q. And he described the fetus a demised fetus that had a membrane basically adhered to it; is that correct?

A. In part, yes.

Q. Okay. What would be the differential diagnosis if you were just going on that report alone? What would pique your curiosity? What would go onto the differential diagnosis to evaluate what might have occurred? And would you explain to the jury what a differential diagnosis is?

A. A differential diagnosis is considering all of the causes of what could have happened in this case and coming up with the best diagnosis.

Q. In other words, considering those causes that might be indicated by the evidence; correct?

A. Well, I wouldn't say causes or indicated. Causes are thought of by the evidence, yeah.

Q. So what would go into the differential diagnosis? What types of occurrences might have occurred other than the one that you referenced earlier?

MR. HART: Objection, your Honor; I think I know where this is going.

THE COURT: Prior order. Sustained.

BY MR. RICCELLI:

Q. When I spoke to you of an alternative during your deposition, was that a surprise to you that there might be an alternative?

MR. HART: These would be questions he brought up, your Honor.

THE COURT: Sustained, counsel. You need to move to another area of inquiry.

MR. RICCELLI: I'm not allowed to voir dire any more?

THE COURT: Counsel, you are not allowed. You need to move to another area of inquiry, your cross-examination.

MR. RICCELLI: I was attempting cross-examination on the cause of death.

THE COURT: Counsel, we've already dealt with this issue. Move on.

BY MR. RICCELLI:

Q. When you were testifying earlier about the difficulty of twin pregnancy and doing monitoring, you're familiar with the publications, the studies by Rodus (Phonetic), et al., and other people who have studied monochorionic monoamniotic twin pregnancies?

A. Yes, I am, but I don't believe they're pertinent to this case.

Q. Well, do you agree that at some time this pregnancy became monochorionic -- or monochorionic monoamniotic?

A. I can say it became functionally monoamniotic.

Q. Correct.

A. I can't say it became monochorionic because as I've stated, I don't know whether it is a monochorionic or a dichorionic pregnancy.

Q. And you're aware that the other experts for the defense have testified it was monochorionic.

A. Yes."

(Dr. D'Alton cross examination, RP filed 11/14/14, hearing 2/18/14, p. 486-488).

7. The following is referred to on pages 46-47:

“RULE 611

MODE AND ORDER OF INTERROGATION AND PRESENTATION

(a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) **Scope of Cross Examination. Cross examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness.** The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

...”

According to Tegland:

“§ 611.9 Scope of cross-examination—Subject matter of the direct examination

Generally. As mentioned, Rule 611 allows cross-examination into matters within “the subject matter of the direct examination.” Or as the rule is perhaps more commonly stated, cross-examination should not exceed the scope of direct examination. The pre-rule cases were in accord and should remain authoritative.

The main problem in applying the rule is defining the subject matter of direct examination. It has been said that when in direct examination “a general subject is unfolded, the cross-examination may develop and explore the various phases of the subject.”

Cross-examination may be had to elicit facts or inferences in order to meet inferences which may be made from direct examination.

In at least one case, the court held that the scope of cross-examination included matters asserted by opposing counsel during opening statements.

In the end, the precise scope of cross-examination is left to the discretion of the trial court to decide on a case-by-case, or even a witness-by-witness, basis. A holding on appeal is not necessarily binding on all trial courts in all future cases. The reported cases are nearly always fact-specific, further limiting their precedential effect. Illustrative holdings, for what they are worth, are collected below.

...”

5A Wash. Prac., Evidence Law and Practice § 611.9 (5th ed.)
(Citations omitted.)

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