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No. 95173-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

L.M., a minor, by and through his Guardian ad Litem,
WILLIAM L.E. DUSSAULT,

Plaintiff/Petitioner,

vs.

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

Respondents/Defendants.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking redress under the civil justice system, including an interest in the evidentiary rules governing the admissibility of expert testimony in medical malpractice actions.

II. INTRODUCTION AND STATEMENT OF THE CASE

Through his guardian, L.M. brings this cause of action for injuries arising out of health care provided by midwife Laura Hamilton at the time of L.M.'s delivery and birth. The facts are drawn from the Court of Appeals' opinion and the briefing of the parties, as well as the report of proceedings of both the motion in limine regarding the testimony of Allen Tencer, Ph.D., and the trial testimony of Dr. Tencer. *See L.M. v. Hamilton*, 200 Wn. App. 535, 402 P.3d 870 (2017), *review granted*, ___ Wn.2d ___, 425 P.3d 517 (2018); L.M. App. Br. at 3-9; Hamilton Resp. Br. at 3-27; L.M. Pet. for Rev. at 2-6; Hamilton Ans. to Pet. for Rev. at 1-10; L.M. Supp. Br. at 2-5.

Midwife Hamilton delivered L.M. at her home birthing center. Soon after his birth, it became evident that L.M. did not have normal use of his right arm. L.M. was eventually diagnosed with avulsion and rupture damage to five nerve roots in his brachial plexus. As a result of this permanent injury, L.M. has limited functional use of his arm and continuing pain.

L.M.'s guardian brought suit against Hamilton alleging professional negligence in performing the delivery. L.M. brought a motion in limine to exclude testimony from Hamilton's experts that the natural (maternal) forces of labor (NFOL) caused his injury. Initially the trial court granted the motion, but subsequently granted Hamilton's motion for reconsideration and permitted evidence at trial of NFOL as a cause of the injuries.

Hamilton also moved to allow Allan Tencer, Ph.D., to testify as an expert witness addressing the forces of maternal labor (endogenous forces) and the forces applied by a health care provider during labor and delivery (exogenous forces):

[Hamilton] made clear that Dr. Tencer would not be offering "medical" opinions ... and Dr. Tencer made clear that "[f]rom a biomechanical forces perspective, it is not possible to differentiate whether the brachial plexus nerve damage suffered by [L.M.] resulted from exogenous, endogenous or some combination of both forces.

Hamilton Ans. to Pet. for Rev. at 8 (brackets added); *see also* Hamilton Resp. Br. at 24. The trial court granted Hamilton's motion to allow Tencer's testimony.

Dr. Tencer does not have a medical degree; his degrees are in mechanical engineering, with a focus on biomechanics and the effects of force on the spine. At trial, Tencer testified generally about the forces exerted on a fetus by the natural forces of maternal labor, and the forces exerted on a newborn by the health care provider assisting in delivery. Tencer has no training or prior experience in obstetrics, and had never before been involved in a labor and delivery case. Apparently to prepare for his testimony, Tencer

reviewed and relied upon a chapter written by a biomechanical engineer in a report published by the American College of Obstetricians and Gynecologists. In that chapter, the author qualifies her data, clarifying that “there can be wide variation in the biomechanical response of fetus and neonate,” “some fetuses are more or less susceptible to injury than others,” “the biomechanics of delivery in relation to maternal anatomy and physiology also vary greatly,” “the effects of applied forces on the fetus’ body are complex,” “[s]ignificant variation exists between individuals, both in terms of mechanical properties and anatomy,” “an estimate of the force needed to cause a nerve rupture cannot be directly established,” “there may be a significant difference between adult and newborn nerve tissue,” and “[t]he nerve tissue properties of the newborn’s brachial plexus have not been adequately studied to establish thresholds for damage based on either of applied forces or resulting stretch.” Michelle Grimm, *Neonatal Brachial Plexus Palsy, Chapter 3, Pathophysiology and Causation*, at 23, 24, 35, in American College of Obstetricians and Gynecologists Report (2014) (brackets added).

Tencer testified that depending upon the size of the fetus, studies have shown the amount of force on the fetus from maternal labor can be from 28 to 37 pounds, and that studies have shown the amount of force applied to the newborn by a health care provider assisting in the delivery can range from 1.6 to 57 pounds. Tencer emphasized that these numbers are general observations and do not apply specifically to the labor and delivery in L.M.’s

case. Tencer did not provide any testimony regarding the forces applied to L.M. by either maternal labor or the midwife's delivery.

At the conclusion of his direct examination by Hamilton's counsel, Tencer offered the following opinion:

Question: So Dr. Tencer, in your opinion, can the forces of labor, the natural forces, cause the rupture and avulsion of a brachial plexus?

Answer: It certainly appears so.

10/27/2015 RP, at 22, ll. 6-9.

The jury returned a defense verdict and L.M. appealed.

The Court of Appeals affirmed. L.M. presented two main issues on appeal: whether the NFOL evidence of causation should have been excluded pursuant to *Frye* and/or because it was not "helpful" under ER 702; and whether Tencer's testimony should have been excluded because he is not qualified and because his testimony was not "helpful" under ER 702. The Court of Appeals held that the trial court properly determined that *Frye* was not implicated in the admission of the NFOL evidence, and that evidence was properly admitted as it was helpful to the jury. *See L.M. v. Hamilton*, 200 Wn. App. at 551, 554.

As to Tencer's testimony, L.M. argued that the trial court abused its discretion by admitting his biomechanical forces of labor testimony, because Tencer does not have a medical degree, he impermissibly provided a medical causation opinion and his testimony was not helpful to the jury. The Court of Appeals held there was no abuse of discretion, because qualified

nonphysicians are permitted “to testify as to ‘causation, reasonable prudence, or underlying facts tending to prove [those] ultimate facts’ in medical malpractice actions.” 200 Wn. App. at 557 (quoting *Harris v. Groth*, 99 Wn.2d 438, 450, 663 P.2d 113 (1983)). The Court noted that Tencer “has extensive training and experience in medical settings with injuries to the spinal cord and nerve roots as well as the force levels necessary to cause them.” 200 Wn. App. at 557. The court held that Tencer did not provide a medical causation opinion. It compared Tencer’s opinion from an automobile accident case, where it was held that an opinion “that the maximum possible force in this accident was not enough to injure a person” is not a medical opinion, as it includes no opinion about the person’s “symptoms or possible diagnoses from those symptoms.” *See L.M.*, 200 Wn. App. at 557 (quoting *Ma’ele v. Arrington*, 111 Wn. App. 557, 564, 45 P.3d 557 (2002)). Without analysis, the court disagreed with L.M.’s argument that Tencer’s testimony was not helpful to the jury. *See* 200 Wn. App. at 558.

III. ISSUES PRESENTED

1. Is a mechanical engineer with a background in biomechanics but no training or prior experience regarding labor and delivery qualified to give an expert opinion in a medical malpractice cause of action as to whether the forces generated by maternal labor alone may be sufficient to cause a brachial plexus injury to a newborn that occurred during labor and/or delivery?
2. Is the testimony of a mechanical engineer in a medical malpractice action regarding the general range of forces applied to a newborn by maternal labor and by a health care provider assisting in delivery, with no attempt to ground his opinion on facts in the record, inadmissible as speculative and unhelpful to the jury?

IV. SUMMARY OF ARGUMENT

Expert testimony is admissible pursuant to ER 702 provided the expert is qualified and his or her testimony is helpful in assisting the trier of fact to understand the evidence or determine a fact in issue. A trial court abuses its discretion by admitting testimony where the expert strays beyond his or her area of expertise, and by admitting expert testimony that offers only a general opinion without linking the opinion to the facts in the case.

Where a proposed expert witness is without the specialized training or experience necessary to offer even a general opinion regarding medical causation, the opinion is not admissible under ER 702. Where an expert in a medical malpractice action offers only a general opinion on causation with no grounding in the facts in the record, the testimony is overly speculative and not helpful to the trier of fact. An overly speculative expert opinion leaves the trier of fact to speculate regarding medical causation without an adequate basis in the facts of the case.

V. ARGUMENT

A. **Brief Overview Of The Admissibility Of Expert Testimony Under Washington Law.**

In Washington, the admissibility of expert testimony is governed by Wash. R. Evid. 702. *See Frausto v. Yakima HMA, LLC*, 188 Wn.2d 227, 238-39, 393 P.3d 776 (2017). ER 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In determining the admissibility of expert testimony, trial courts generally consider whether –

(1) the expert is qualified, (2) the expert relies on generally accepted theories in the scientific community, and (3) the testimony would be helpful to the trier of fact.

Gilmore v. Jefferson Cty. Pub. Transp. Benefit Area, 190 Wn.2d 483, 495, 415 P.3d 212 (2018) (quoting *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 352, 333 P.3d 388 (2014)). Whether an expert’s testimony is admissible depends upon whether the subject matter is within his or her area of expertise. See *In re Marriage of Katare*, 175 Wn.2d 23, 38, 283 P.3d 546 (2012). Courts should not hesitate “to exclude testimony by a purported expert whose opinion is beyond the witness’s expertise, or whose opinion is too speculative to be helpful to the trier of fact.” 5B Karl B. Tegland, *Washington Practice: Evidence Law and Practice*, §702.5 (6th ed., June 2018 update).

Trial courts retain broad discretion as to the admissibility of expert testimony. See *Johnston-Forbes*, 181 Wn.2d at 354-55. This Court reviews a trial court’s rulings on the admissibility of expert testimony for an abuse of discretion. See *Gilmore*, 190 Wn.2d at 494; *Johnson-Forbes*, 181 Wn.2d at 352. A trial court abuses its discretion if its decision is based on untenable grounds or untenable reasons. See *Teter v. Deck*, 174 Wn.2d 207, 222, 274 P.3d 336 (2012). If the basis for the admission of expert testimony is “fairly debatable,” the Supreme Court will not disturb the trial court’s ruling.

Gilmore, 190 Wn.2d at 494 (quoting *Grp. Health Coop. of Puget Sound, Inc. v. Dep't of Revenue*, 106 Wn.2d 391, 398, 722 P.2d 787 (1986)).

However, discretion does not mean “immunity from accountability.” See *Carson v. Fine*, 123 Wn.2d 206, 226, 867 P.2d 610 (1994). This Court has found manifest abuse of discretion by a trial court admitting expert testimony where the expert strayed beyond his field of expertise (*i.e.*, he lacked the factual “knowledge, skill, experience, training, or education” required by ER 702), and he lacked sufficient foundational facts to support his opinion. See *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 102-04, 882 P.2d 703 (1994). This Court reasoned:

[T]here is no value in an opinion that is wholly lacking some factual basis.... Where there is no basis for the expert opinion other than theoretical speculation, the expert testimony should be excluded.

Id. at 102-03 (brackets added; citations omitted).

B. Under ER 702, A Proffered Witness Is Not Qualified To Offer Expert Testimony If The Witness Lacks The “Scientific, Technical, Or Other Specialized Knowledge” Necessary To Offer An Opinion That Will Assist The Trier of Fact To Understand The Evidence Or To Determine A Fact In Issue.

The rules of evidence recognize that “a reasoned evaluation of the facts” may require the specialized knowledge of an expert. See *Johnston-Forbes*, 181 Wn.2d at 354. Expert medical testimony is required on those matters “strictly involving medical science.” *Street v. Weyerhaeuser Co.*, 189 Wn.2d 187, 198, 399 P.3d 1156 (2017) (quoting *Smith v. Shannon*, 100 Wn.2d 26, 33, 666 P.2d 351 (1983)). Questions of medical science requiring expert testimony include “the nature of the harm which may result and the

probability of its occurrence,’ because ‘[o]nly a physician (or other qualified expert) is capable of judging what risks exist and their likelihood of occurrence.’” *Street*, 189 Wn.2d at 198 (quoting *Smith*, 100 Wn.2d at 33).

Generally, in a medical malpractice case medical expert testimony is required for proof of causation. *See* 16 David K. DeWolf and Keller W. Allen, *Washington Practice: Tort Law and Practice*, §16:7 (4th ed., Oct. 2017 update); *see also Frausto*, 188 Wn.2d at 232; *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). ER 702 governs a trial court’s determination of whether a purported medical expert witness is qualified to testify regarding proximate cause in a medical malpractice case, and there is no per se requirement that a qualified medical expert witness be an M.D. in order to provide such causation testimony. *See Frausto*, 188 Wn.2d at 242. It is “[t]he scope of the expert’s knowledge, not his or her professional title, [that] should govern the threshold question of admissibility of expert medical testimony in a malpractice case.” *Id.* at 234 (quoting *Hill v. Sacred Heart Med. Ctr.*, 143 Wn. App. 438, 447, 177 P.3d 1152 (2008) (internal citation omitted)).

In *Frausto*, in determining that an ARNP may have the requisite expertise under ER 702 to provide a proximate cause opinion in a medical malpractice case, this Court examined Washington statutes and regulations that have empowered ARNPs to diagnose and independently treat patients within the scope of their certification. 188 Wn.2d at 234-36. Ultimately, the Court found that “[i]f an ARNP is qualified to independently diagnose a

particular medical condition, it follows that the ARNP may have the requisite expertise under ER 702 to discuss medical causation of that condition.” *Id.* at 234. However, “[i]n the absence of evidence that the witness has the specialized training or experience necessary to draw the inference offered, the opinion lacks a proper foundation and is not admissible under ER 702.” *Simmons v. City of Othello*, 199 Wn. App. 384, 392-93, 399 P.3d 546 (2017). “An expert must stay within the area of his expertise.” *Queen City Farms*, 126 Wn.2d at 102.

Here, Hamilton insists that Tencer did not testify to medical causation. She maintains that Tencer “was not asked to give and did not give a medical opinion as to standard of care or causation of L.M.’s BPI, nor was he asked to testify about the actual forces involved in L.M.’s labor and delivery or whether L.M.’s BPI resulted from exogenous or endogenous forces or some combination thereof.” Hamilton Supp. Br. at 12.¹ For at least two reasons, Hamilton’s argument cannot remedy the deficiencies in Tencer’s testimony.

First, there was no evidence that Dr. Tencer has the training or experience necessary to testify about the forces involved in labor and delivery, or to give an opinion that a newborn’s brachial plexus avulsion

¹ Yet Hamilton also argues that L.M. should have objected to the causation question posed to Dr. Tencer. *See* Hamilton Supp. Br. at 16-17. It appears that Hamilton and L.M. disagreed as to whether a general question to Dr. Tencer asking if the natural forces of labor can cause a brachial plexus avulsion injury constitutes a "causation" question, and the trial court agreed with Hamilton in deciding the motion in limine in her favor. "In cases where a motion in limine has been denied, the motion in limine is normally sufficient to preserve an issue for appeal without the necessity of renewing the objection when the evidence is presented at trial." 30 David N. Finley and Lisa Maguire, *Washington Practice: Washington Motions in Limine* §1.5 (2017-18 ed.).

injury could be caused by maternal labor alone. Tencer's testimony strayed beyond his area of expertise.

“Dr. Tencer is a well-known expert in Washington, having contributed biomechanical testimony in many personal injury cases.” *Gilmore*, 190 Wn.2d at 489. Tencer has testified as an expert in many cases regarding the amount of force involved in automobile collisions. *See Stedman v. Cooper*, 172 Wn. App. 9, 17, 292 P.3d 764 (2012). Dr. Tencer has bachelor's, master's and Ph.D. degrees in mechanical engineering, he is a former professor in biomechanical engineering at the University of Washington, and he has done “research in the field of biomechanics related to injury prevention.” *Gilmore*, 190 Wn.2d at 489; *Johnston-Forbes*, 181 Wn.2d at 350, 355-56. Generally, Tencer's area of expertise centers around the underlying mechanisms of injury to the cervical spine that may result from forces between colliding objects. *See Stedman*, 172 Wn. App. at 15.

Some Washington appellate courts have found that trial courts did not abuse their discretion in admitting Dr. Tencer's testimony in automobile collision cases. *See Johnson-Forbes*, 181 Wn.2d at 357; *Ma'ele*, 111 Wn. App. at 563. In *Ma'ele*, the court of appeals held that it was not an abuse of discretion for the trial court to allow Tencer to offer testimony about the amount of force involved in low-speed collisions, as well as his opinion that he would not expect a person to be injured in the collision involving Ma'ele. *See Ma'ele*, 111 Wn. App. at 560. Other Washington appellate courts have found that trial courts did not abuse their discretion in excluding Dr. Tencer's

testimony in automobile collision cases. *See Gilmore*, 190 Wn.2d at 498; *Berryman v. Metcalf*, 177 Wn. App. 644, 654, 312 P.3d 745 (2013), *review denied*, 179 Wn.2d 1026 (2014); *Stedman*, 172 Wn. App. at 21.

Here, Dr. Tencer has no background related to obstetrics or injuries to newborns occurring in the course of labor or delivery. Dr. Tencer estimates that he has testified approximately 250 times over a 20 year period, mostly in low-speed car crash cases, some slip and fall cases and some “fisheries-type” cases. He has never before testified in a labor and delivery case. When asked at trial whether he was aware of any reports of an avulsion of a newborn’s brachial plexus by any means, Dr. Tencer responded that was out of his “area.” 10/27/2015 RP, at 30, ll. 20-25. While his lack of a medical degree does not automatically disqualify him from giving expert testimony in a medical malpractice case, Tencer’s lack of “knowledge, skill, experience, training, or education” as required by ER 702 does disqualify him from giving an expert opinion regarding the forces applied to a newborn in labor and delivery.

Second, even “general” causation testimony, such as Tencer provided in this case, may be improper medical expert testimony that is misleading to the jury. In *Johnston-Forbes*, this Court found that it was not an abuse of discretion for the trial court to allow Tencer to testify generally about the forces acting upon the two colliding vehicles involved in an accident, and the forces acting upon Johnston-Forbes’ body during the collision. *See Johnston-Forbes*, 181 Wn.2d at 351. In so holding, this Court

noted the Court of Appeals’ recognition that “Tencer did not offer a medical opinion, as he did not opine as to whether the forces involved in the crash would have caused injuries *to anyone in general* or to Johnston-Forbes in particular.” 181 Wn.2d at 354 (emphasis added). The Court of Appeals stated:

Significantly, Tencer did *not* offer an opinion about whether the forces involved in the accident would or would not have caused personal injuries to anyone in general or to Johnston-Forbes in particular... We hold that an expert’s description of forces generated during the collision is not medical testimony.

Johnston-Forbes v. Matsunaga, 177 Wn. App. 402, 408-09, 311 P.3d 1260 (2013), *aff’d*, 181 Wn.2d 346, 333 P.3d 388 (2014). The Court of Appeals reasoned that the trial court did not abuse its discretion in allowing Tencer’s force of impact testimony, “especially in light of [defendant’s] limiting Tencer’s testimony such that he did not offer any opinion about whether the forces in the accident were or were not sufficient to cause injury.” 177 Wn. App. at 410 (brackets added).

Here, Dr. Tencer’s testimony went beyond describing the forces involved in labor and delivery when he gave an expert medical opinion that the natural forces of maternal labor alone can cause the rupture and avulsion of a newborn’s brachial plexus. In *Johnston-Forbes*, Tencer did not give a causation opinion:

Given his training and experience and the limits of his expertise, Tencer appropriately did not opine on the injuries Johnston-Forbes may have sustained and the trial court properly limited any testimony that would tie in Tencer’s observations about force of impact in relation to Johnston-Forbes’s injuries.

Johnston-Forbes, 181 Wn.2d at 355.

In *Johnston-Forbes*, it was not an abuse of discretion to allow Tencer's testimony where "Tencer did not offer a medical opinion, as he did not opine as to whether the forces involved in the crash would have caused injuries to anyone in general..." *Id.* at 354. Here, Tencer offered a medical opinion that the natural forces of maternal labor alone can cause a newborn's brachial plexus avulsion injury. Dr. Tencer is not qualified to give a medical causation opinion in a labor and delivery medical malpractice case, and allowing that testimony is an abuse of trial court discretion.

C. A Proffered Expert Witness's General Opinion, With No Grounding In The Particular Facts In The Case, Is Overly Speculative And Inadmissible Under ER 702, As It Will Not Assist The Trier Of Fact To Understand The Evidence Or To Determine A Fact In Issue.

Before allowing a witness to give an expert opinion, the trial court must scrutinize the witness's underlying information and "find that there is an adequate foundation so that an opinion is not mere speculation, conjecture, or misleading." *Johnston-Forbes*, 181 Wn.2d at 357. Expert opinions lacking an adequate foundation should be excluded. *See id.* Whether expert testimony is too speculative to be admissible depends upon the expert's basis for forming the opinion, not on the expert's conclusions. *See Volk v. DeMeerleer*, 187 Wn.2d 241, 277, 386 P.3d 254 (2016). Washington courts have consistently found that expert testimony is inadmissible as overly speculative when the testimony is not linked to the facts in the record. *See id.* An expert's opinion should be excluded "if the

expert can offer only a generalized opinion, without sufficiently tying the opinion to the facts of the case.” 5B Karl B. Tegland, *Washington Practice: Evidence Law and Practice*, §702.24 (6th ed., June 2018 update). “The concern about speculative testimony is that the trier of fact will be forced to speculate as to causation without an adequate factual basis.” *Volk*, 187 Wn.2d at 277 (citation omitted).

Tencer’s methodology for his proffered expert opinions in automobile collision cases is set forth in several of the decisions concerning the admissibility of his testimony, and demonstrates his attempts to ground his opinions in the facts of each particular case. In *Gilmore*, Dr. Tencer stated that he does not generally offer any medical opinion, but is concerned only with the “severity of the impact in a given collision.” 190 Wn.2d at 489. His intended testimony in *Gilmore* related to a “quantitative description of the forces experienced by the Plaintiff in the crash and a comparison of those forces to forces of common experience.” *Id.* Dr. Tencer considers several factors to calculate the forces involved in a particular collision, including “weights of the vehicles... the speed of the striking vehicle based on its level of damage, and the coefficient of restitution [,] which describes the elasticity of the impact and braking forces, to compute the speed change and acceleration of the struck vehicle.” *Id.*

In *Johnston-Forbes*, Dr. Tencer reviewed photographs of the defendant’s automobile, depositions of the parties, engineering data on both vehicles involved in the collision, and bumper crash test information on the

plaintiff's automobile. He also performed impact tests on both vehicles' bumpers in order to provide a foundation for his opinions regarding the forces involved in the collision and the capacity for injury. *See Johnston-Forbes*, 181 Wn.2d at 350-51. In *Stedman*, Dr. Tencer used photographs to size the area of deformation on defendant's car, used information regarding the weights of the two vehicles involved in the collision and the crush strength of the bumper in order to calculate the speed of the two vehicles, used the calculated speed of the vehicles to determine the acceleration, and from that determined the forces acting on the occupants of the plaintiff's vehicle. *See Stedman*, 172 Wn. App. at 15-16. With that foundation for his opinion regarding the forces acting on the plaintiff, Dr. Tencer compared those forces with the forces involved in daily activities. *See id.* at 16.

In contrast to his case-specific calculations in the reported automobile crash cases, in *L.M.* Dr. Tencer did not ground his opinions in the particular facts concerning L.M.'s mother's labor and L.M.'s delivery and birth injury. While testifying about the range of forces imparted on a fetus by the maternal forces of labor (28 to 37 pounds), Tencer emphasized that those numbers don't apply to L.M.'s case. *See 10/27/2015 RP* at p.14, l. 25 – p.15, l. 7. While testifying about the range of forces applied by the health care provider guiding and pulling the newborn out during birth (1.6 to 57 pounds), Tencer acknowledged that he did not know the amount of force imparted by Hamilton on L.M. during the birth process. *See 10/27/2015 RP* at p.15, l. 9 – p.16, l. 7. Dr. Tencer did not attempt to calculate or approximate

the amount of endogenous and exogenous forces involved in the labor and delivery in L.M.'s case. In the primary authority Dr. Tencer relied upon in both his declaration and trial testimony, the author discussing the cause of neonatal brachial plexus injuries states "an estimate of the force needed to cause a nerve rupture cannot be directly established," and "[t]he nerve tissue properties of the newborn brachial plexus have not been adequately studied to establish thresholds for damage based on either applied force or resulting stretch."²

Dr. Tencer was unable to calculate forces specific to the labor and delivery in L.M.'s case. Moreover, the primary authority he relied upon to testify about the amount of endogenous and exogenous force in labor and delivery necessary to cause a brachial plexus nerve rupture acknowledges that an estimate of such forces cannot be established. Nonetheless, Dr. Tencer rendered the general opinion that a brachial plexus avulsion injury can be caused by the maternal forces of labor alone. This opinion was too speculative to be of assistance to the jury, and should have been excluded as it has no foundation grounded in the facts of the case.

Notwithstanding the generalized nature of Tencer's causation opinion in *L.M.*, such testimony is harmful.³ Tencer states that he is not

² Michelle Grimm, Neonatal Brachial Plexus Palsy, Chapter 3, Pathophysiology and Causation, at 35 (American College of Obstetricians and Gynecologists Report, 2014).

³ Hamilton also argues that any error did not prejudice L.M. because Tencer did not testify regarding the applicable standard of care, and the jury found Hamilton was not negligent and did not reach the causation question. *See* Hamilton Supp. Br. at 19-20. The appellate court addressed this issue in a medical negligence action in *Colley v. PeaceHealth*, 177 Wn. App. 717, 728, 312 P.3d 989 (2013):

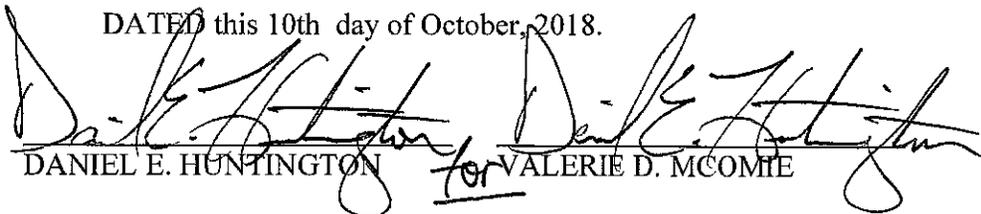
The hospital points out that each expert was offered as a witness on causation and the jury did not reach the issue of causation. This does not, however, necessarily

giving a medical opinion and that he does not know the forces involved in L.M.'s labor and delivery. Yet, the inference intended to be drawn from Tencer's testimony is that L.M. cannot show that his birth injury was more probably caused by the forces applied by the delivering midwife than the forces applied by maternal labor. *See Stedman*, 172 Wn. App. at 17-18, 20. When ruling on the admissibility of speculative testimony, a trial court "should keep in mind the danger that the jury may be overly impressed with a witness possessing the aura of an expert." *Stedman*, 172 Wn. App. at 16. The trial court abused its discretion by permitting Dr. Tencer's opinion, which lacked sufficient foundational facts upon which to base the opinion.

VI. CONCLUSION

The Court should adopt the analysis advanced in this brief in the course of resolving the issues on review.

DATED this 10th day of October, 2018.


DANIEL E. HUNTINGTON for VALERIE D. MCOME

On Behalf of WSAJ Foundation

mean that their testimony could not have been prejudicial. In a personal injury trial, it is not always possible to keep the issues of breach and causation compartmentalized. Even if the witnesses were examined only about causation, their opinions could have tainted the jury's consideration of the negligence question.

Here, in the motion in limine, Hamilton argued the causation issue was central to the entire case and related to the issue of whether Hamilton handled the birth properly. *See* 10/12/2015 RP at 9, ll. 2-6. In ruling on the motion in limine, the trial court recognized the effect of limiting Hamilton's causation theory on the standard of care issue. *See id.* at 27, ll. 1-7. A harmless error is an error that "in no way affected the final outcome of the case." *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 311, 898 P.2d 284 (1995) (citations omitted). When "there is no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary." *Thomas v. French*, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983).

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury, under the laws of the State of Washington, that on the 10th day of October, 2018, I served the foregoing document by email to the following:

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October 10, 2018 - 5:06 PM

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