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NO. 95173-0

SUPREME COURT OF THE STATE OF WASHINGTON

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

Petitioners,

v.

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

Respondents.

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RESPONDENT HAMILTON'S ANSWER TO  
BRIEFS OFAMICI CURIAE  
WASHINGTON STATE ASSOCIATION FOR JUSTICE  
FOUNDATION AND DR. MICHAEL D. FREEMAN

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Respondent Laura Hamilton submits this Answer to the briefs filed by Amici Curiae Washington State Association for Justice Foundation (WSAJF) and Dr. Michael D. Freeman (Freeman).

## I. INTRODUCTION

In their amicus briefs, both WSAJF and Freeman address only the admissibility of Dr. Tencer's testimony, with WSAJF focusing on whether Dr. Tencer was qualified and his testimony was helpful under ER 702, and Freeman focusing principally on whether Dr. Tencer's testimony (or its methodology) is generally accepted under *Frye*.<sup>1</sup> While acknowledging the broad discretion trial courts retain to determine admissibility of expert testimony, WSAJF essentially repeats arguments made by L.M., erroneously claiming that Dr. Tencer gave a medical causation opinion that he lacked qualification to give and that was too speculative to be of assistance to the jury. Freeman, going far beyond any argument advanced by L.M. and essentially offering his own expert testimony, also erroneously claims that Dr. Tencer offered a medical causation opinion (that Dr. Tencer nowhere offered) that natural forces of labor (NFOL) caused L.M.'s brachial plexus injury (BPI), and that Dr. Tencer did not follow generally accepted scientific methodologies in reaching that opinion (that Dr. Tencer did not give).

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<sup>1</sup> *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

Beside the fact that the arguments of both amici proceed from the erroneous premise that Dr. Tencer gave a medical causation opinion, nothing either of them proffers establishes that the trial court abused its discretion in determining that Dr. Tencer was qualified to testify about the biomechanical forces at play in labor and delivery or that such testimony would be helpful to the jury, or erred in concluding that the scientific methodologies supporting natural forces of labor as a cause of neonatal BPIs were not novel and were generally accepted under *Frye*.

## II. DR. TENCER'S TESTIMONY

In response to the court's request for information about Dr. Tencer's anticipated testimony, *see* 9/18 RP (Motion Hearing) 26:2-12; CP 2358, Midwife Hamilton filed a "Motion to Allow" his testimony as to the endogenous and exogenous forces involved in the birth process and whether they could cause brachial plexus injury. CP 2358-2608; *see also* CP 3231-38. She represented that Dr. Tencer would not offer "medical" opinions, CP 2360, would not "talk about standard of care," and would only "talk about causation to the extent that it fits with his biomechanical engineering background" – that is, about "natural forces of labor as a possible cause of brachial plexus injuries, including avulsions and ruptures," 10/12 RP (Motion Hearing) at 34. As Dr. Tencer himself made clear, "[f]rom a biomechanical forces perspective, it is not possible to differentiate whether the

brachial plexus nerve damage suffered by [L.M.] resulted from exogenous, endogenous or some combination of both forces.” CP 2376 (¶5(i)).

The trial court considered the motion to allow Dr. Tencer’s testimony the same day it considered and granted Midwife Hamilton’s motion to reconsider its earlier adverse ruling on admissibility of NFOL causation evidence. *See* 10/12 RP (Motion Hearing) 1-38. After ruling that it would allow the defense to present evidence regarding NFOL causation, *id.* at 26-30, the trial court also granted the motion to allow Dr. Tencer’s testimony, *id.* at 37-38. The trial court distinguished its previous exclusion of Dr. Tencer’s testimony in an auto accident case, and found that he was qualified to testify in this case, that his testimony would be helpful to the jury to understand the forces at play, and that L.M.’s criticisms of his testimony would make “excellent arguments for cross-examination.” *Id.* at 37. Based on defense counsel’s statements about Dr. Tencer not “testifying about causation,” the trial court made clear that “if he crosses that line I expect an immediate objection which will be sustained.” *Id.* at 37-38.

At trial, Dr. Tencer testified about the endogenous and exogenous forces generally at play in the birth process. 10/27 RP (Tencer) 1-39. Based on the biomechanical studies that have been done to measure those forces, Dr. Tencer testified that the internal forces trying to push the baby out range from about 28 to 37 pounds, and the external forces from the birth

attendant's guiding or pulling the baby out range from 1.6 to 57 pounds, such that on average they are about the same. 10/27 RP (Tencer) 9:17-16:3, 31:13-25. He then testified about the "contact forces," the compression and tension forces at play on the brachial plexus when a baby's shoulder comes up against a solid obstruction such as the mother's pelvis and the mother pushes. He noted that studies have shown not only that the compression forces are four-to-nine times greater than the tension forces, but that nerves can withstand more tension than compression, as nerves can typically withstand a stretch of as much as 30 percent. *Id.* at 16:15-19:5, 35: 5-10, 36:4-37:24. He also testified, based on his own work with bones and nerves, that nerves are much weaker than bones, *id.* at 19:18-20:2, 24:19-25:24; *see also* CP 2373 (¶2), and that, if NFOL can cause fractures of the clavicle (which even L.M.'s experts admitted was true, *see* 10/21 RP (Mandel) 88:2-25; 10/22 RP (Glass) 104:10-25), that shows that the NFOL are very high. 10/27 RP (Tencer) 20:11-19.

At the end of his direct examination, Dr. Tencer, without objection, was asked the following question and gave the following answer:

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

A. It certainly appears so.

*Id.* at 22:6-9. At no time was Dr. Tencer asked about nor did he offer opinions as to the specific forces involved in L.M.'s labor and delivery or the cause of L.M.'s injury. At no time did he testify that exogenous forces could not have caused L.M.'s injury. Nor did he ever testify that endogenous forces caused L.M.'s injury. *See* 10/27 RP (Tencer) at 1-39.

### III. ARGUMENT

A. The Trial Court Did Not Abuse Its Discretion in Determining that Dr. Tencer Was Qualified to Testify About the Relative Strength of the Endogenous and Exogenous Biomechanical Forces at Play in Labor and Delivery or their Ability to Injure the Brachial Plexus.

Citing cases concerning the need for expert medical testimony on matters “strictly involving medical science” and to establish proximate causation in a medical malpractice cases, WSAJF argues, *WSAJF Br. at 8-14*, as did L.M., that Dr. Tencer was not qualified to testify about the endogenous and exogenous biomechanical forces generally at play in labor and delivery or whether such forces can cause rupture or avulsion of the brachial plexus because he does not have a medical degree, “has no background related to obstetrics or injuries to newborns occurring in the course of labor or delivery,” and “has never before testified in a labor and delivery case.” But, WSAJF’s arguments, like L.M.’s, ignore the fact that Dr. Tencer was not called to give, and did not give, medical expert testimony, and was not asked to, and did not, opine about matters “strictly involving medical science” or the proximate cause of L.M.’s injury.

WSAJF cites no authority suggesting that testimony as to the relative strength of the endogenous and exogenous forces at play during labor and delivery or whether either or both are capable of causing a brachial plexus injury concerns matters “strictly involving medical science,” so as to fall solely within the purview of medical experts. Indeed, WSAJF concedes, *WSAJF Br. at 12*, that the lack of a medical degree does not automatically disqualify Dr. Tencer from giving expert testimony in a medical malpractice case. And, WSAJF also appears to concede, *WSAJF Br. at 12*, that Dr. Tencer properly could give “general” causation testimony as long as he did not cross into “improper medical expert testimony.”

To the extent that WSAJF claims, *WSAJF Br. at 10-12*, as did L.M., that Dr. Tencer’s background or area of expertise is not specifically related to obstetrics or injuries to newborns, WSAJF cites no authority suggesting that an expert in a given field, here biomechanical engineering, must have obtained his knowledge through personal experience and cannot testify based on knowledge acquired through review of published works done by others in that field. As this Court noted long ago in *Bradley v. Consol. Silver Mt. Mines Co.*, 162 Wash. 198, 202, 298 P. 324 (1931) (emphasis added):

The test to be applied in determining the competency of a witness to testify as an expert is implied in the definition of expert evidence. He must have acquired such special knowledge of the subject matter about which he is to testify, *either by study of the recognized authorities on the subject or by*

*practical experience*, that he can give the jury assistance and guidance in solving a problem to which their equipment of good judgment and average knowledge is inadequate. If he can qualify under this test he may testify, otherwise not.

Here, it cannot fairly be said that no reasonable person could conclude that Dr. Tencer was qualified, or that it was not at least “fairly debatable” that he was qualified, to testify about the relative strength of the endogenous and exogenous forces at play during labor and delivery, and whether either or both of those forces could be sufficient to rupture or avulse an infant’s brachial plexus, given his education and training as a biomechanical engineer, his review of the published biomechanical studies done by other biomechanical engineers to measure those forces, and his own biomechanical research studying the strength of the spinal cord and nerve roots, the elastic strength of nerves and the dura surrounding and protecting the nerve roots and spinal cord, and the forces needed to fracture bones. “A reviewing court may not find abuse of discretion simply because it would have decided the case differently – it must be convinced that “no reasonable person would take the view adopted by the trial court,” and “[i]f the basis for admission of the evidence is “fairly debatable, we will not disturb the trial court’s ruling.” *Gilmore v. Jefferson County Pub. Transp. Benefit Area*, 190 Wn.2d 483, 494, 415 P.3d 212 (2018) (citations omitted).

Contrary to WSAJF’s assertions, Dr. Tencer did not need a medical

degree to testify that, according to the biomechanical research that had been done to study the endogenous and exogenous forces of labor, it appears that the endogenous forces generally on average are at least equal to, if not greater than the exogenous forces, or to opine that, if the exogenous forces are of sufficient strength to rupture or avulse a brachial plexus, so are the equivalent, if not greater, endogenous forces. Nor did he need a medical degree to testify based on his own biomechanical research that nerves are weaker than bones, and that, if the endogenous forces of labor and delivery are capable of fracturing bones such as the clavicle, it would appear that they are high enough to be capable of injuring nerves of the brachial plexus.

That WSAJF, like L.M., characterizes Dr. Tencer's opinion, 10/27 RP (Tencer) at 22, that "[i]t certainly appears" that the NFOL can "cause the rupture and avulsion of a brachial plexus" as an expert medical opinion does not make it so. Dr. Tencer did not offer any opinion as to the forces involved in L.M.'s labor and delivery. He left it to the medical experts to opine about whether or not the video of L.M.'s birth showed any use of excessive traction by Midwife Hamilton. And, Dr. Tencer did not opine as to whether L.M.'s BPI was caused by endogenous or exogenous forces or both, something he disclaimed the ability to do from a biomechanical perspective. He left those opinions to the medical experts as well.

Even if Dr. Tencer's answer to the one question whether in his

opinion from a biomechanical perspective NFOL can cause a rupture or avulsion of the brachial plexus crossed the line into medical causation opinion testimony, which it did not, the fact remains that L.M. did not object when the question was asked, even though the trial court had made clear, 10/12 RP (Motion Hearing) at 37-38, that if Dr. Tencer crossed the line, the court expected an immediate objection that it would sustain. WSAJF's assertion, *WSAJF Br. at 10 n.1*, that L.M. didn't need to object because the trial court had granted the motion in limine to allow Dr. Tencer's testimony is incorrect. Although the trial court granted the motion, it did so with limitations as to testimony about causation. As to those limitations, L.M. was not the losing party and, if L.M. thought Dr. Tencer violated those limitations, L.M. needed to object to preserve any claim of error.

When an evidentiary ruling is pursuant to a motion in limine, only *the losing party* is deemed to have a standing objection and need not specifically object at trial to preserve the issue for appeal. ... Additionally, a party's objections to evidence made in their motion in limine are not preserved for appeal if the "trial court indicates that further objections at trial are required when making its ruling." [Emphasis by the court.]

*State v. Finch*, 137 Wn.2d 792, 819-20, 975 P.2d 967 (1999) (citations omitted). By failing to object, L.M. deprived the trial court of the opportunity to avoid the claimed error or to cure any potential prejudice. *See, e.g., State v. Sullivan*, 69 Wn. App. 167, 172, 847 P.2d 953 (1993); *Sturgeon v. Celotex Corp.*, 52 Wn. App. 609, 623, 762 P.2d 1156 (1988).

B. The Trial Court Did Not Abuse Its Discretion in Finding that Dr. Tencer's Testimony Would Be Helpful to the Jury.

WSAJF claims, *WSAJF Br. at 14-18*, that, because Dr. Tencer did not testify about the specific forces involved in L.M.'s labor and delivery, his testimony about the relative strength of the endogenous and exogenous forces at play in labor and delivery and whether the endogenous forces (NFOL), which on average are equal to if not greater than the exogenous forces, and which can cause fractures of bones that are stronger than nerves, can cause brachial plexus ruptures or avulsions was too speculative to be helpful to the jury and thus inadmissible. But, neither the cases WSAJF cites in support of its claim nor the cases Freeman cites, *Freeman Br. at 16*, for his similar claim, go so far as to suggest that any expert who offers testimony bearing on causation must specifically testify to the cause of the plaintiff's injury. Indeed, this Court in *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 354-56, 333 P.3d 388 (2014), found no abuse of discretion for the trial court to conclude that Dr. Tencer's testimony was relevant and helpful to the jury to understand what forces might have been involved in a collision, as compared to forces of daily living, while Dr. Tencer did not address and left it to the jury to determine whether plaintiff experienced the same force and, if so whether that caused her injury.

Here, where L.M. claimed that only excessive traction by the birth

attendant, and not NFOL, could cause a rupture or avulsion of the brachial plexus, the trial court could and did, in the proper exercise of its discretion, conclude that it would be helpful for the jury to understand the endogenous and exogenous biomechanical forces generally at play in labor and delivery and what the available published studies show as to how those forces compare with each other in order for the jury to be able to evaluate the parties' competing claims and expert medical testimony as to the cause of L.M.'s injuries. That Dr. Tencer was not able to testify about the amount of exogenous traction force Midwife Hamilton did or did not use, leaving that to the medical experts to evaluate from review of the birth video and medical records, did not render his biomechanical forces testimony speculative, lacking adequate factual basis, or unhelpful to the jury in deciding the validity of L.M.'s claim that NFOL alone cannot cause a rupture or avulsion BPI.

WSAJF's assertion, *WSAJF Br. at 17*, that Dr. Tencer's "general opinion that a brachial plexus avulsion injury can be caused by the maternal forces of labor alone ... was too speculative to be of assistance to the jury" ignores that the defense medical experts testified similarly based on their knowledge, training and experience, their review of L.M.'s birth video, and their understanding of the peer-reviewed medical literature. *See* 10/28 RP (DeMott) 28:3-10, 67:3-69:5; CP 4981-82. And, admission of evidence that is "merely cumulative in nature" is "harmless error." *Brown v. Spokane*

*Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 688 P.2d 571 (1983). WSAJF further ignores that L.M., not Midwife Hamilton, bore the burden of proving proximate causation, and that Midwife Hamilton was entitled to present evidence of other possible causes to refute L.M.’s theory and deprive L.M.’s proof “of the persuasive power necessary to cross the 50 percent threshold.”<sup>2</sup> *Colley v. PeaceHealth*, 177 Wn. App. 717, 728-30, 732, 312 P.3d 989 (2013). As cogently explained in *Wilder v. Eberhart*, 977 F.2d 673, 676-67 (1<sup>st</sup> Cir. 1992), *cert. denied*, 508 U.S. 930 (1993) (citations omitted):

Defendant need not prove another cause, he only has to convince the trier of fact that the alleged negligence was not the legal cause of the injury. . . . In proving such a case, a defendant may produce other “possible” causes of the plaintiff’s injury. These other possible causes need not be proved with certainty or more probably than not. To fashion such a rule would unduly tie a defendant’s hands in rebutting a plaintiff’s case, where as here, plaintiff’s expert testifies that no other cause could have caused plaintiff’s injury. The burden would then shift and defendant would then bear the burden of positively proving that another specific cause, not the negligence established by plaintiff’s expert, caused the injury.

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<sup>2</sup> Freeman’s attempts to distinguish *Colley*, *Freeman Br. at 17-18*, are unavailing. First he presupposes Dr. Tencer opined on medical causation, and then claims that the *Colley* court’s approval of allowing the defense to present expert testimony about “other possible causes” in a medical malpractice case should be limited because the experts who so testified in *Colley* were medical doctors, not engineers, and because the plaintiff in *Colley* was arguing that there was no other possible cause for plaintiff’s injury other than the cause plaintiff alleged. Here, Dr. Tencer did not testify about medical causation, only the medical experts did, and L.M. and his experts did claim that the only possible cause for L.M.’s injury was the cause L.M. alleged – excessive traction by Midwife Hamilton. Second and more importantly, Freeman’s attempt to distinguish *Colley* ignores the underlying legal premise that it is the plaintiff, not the defendant who has the burden of proving causation by a preponderance of the evidence – that is more probably than not.

C. Dr. Tencer's Testimony Was Based on Generally Accepted, Not Novel, Scientific Methodologies.

As WSAJF correctly noted, *WSAJF Br. at 4*, the issues L.M. raised on appeal with regard to Dr. Tencer's testimony, *see App. Br. at 22-31*, were whether it should have been excluded under ER 702 on grounds that he was not qualified and his testimony was not helpful to the jury. Those were the issues regarding Dr. Tencer's testimony that were presented to and ruled upon by the trial court, *see 10/12 RP 31-38*, and the Court of Appeals, *L.M. v. Hamilton*, 200 Wn. App. 535, 556-58, 402 P.3d 870 (2017), *rev. granted*, 191 Wn.2d 1011 (2018). In neither the trial court nor the Court of Appeals did L.M. argue specifically that Dr. Tencer's testimony (as opposed to NFOL causation evidence generally) should be excluded under the *Frye* general acceptance test.<sup>3</sup> Yet, Freeman devotes most of his amicus brief to arguing for exclusion of Dr. Tencer's testimony under *Frye*. "Appellate courts will not usually decide an issue raised only by amicus." *Noble Manor v. Pierce County*, 133 Wn.2d 269, 272 n.1, 943 P.2d 1278 (1997) (citing *Coburn v. Seda*, 101 Wn.2d 270, 279, 677 P.2d 173 (1984)).

Even if this Court were to consider Freeman's *Frye* arguments, his arguments should be rejected for any number of other reasons. First, his

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<sup>3</sup> To the extent L.M. argued that Dr. Tencer's testimony was unreliable, he, like the plaintiff in *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 920, 296 P.3d 860 (2013), did so with regard to the "helpfulness" prong of ER 702.

*Frye* arguments proceed from the erroneous premise that Dr. Tencer testified that NFOL caused L.M.’s BPI. As previously noted, Dr. Tencer did not offer any such testimony.<sup>4</sup> It was Midwife Hamilton’s medical experts, not Dr. Tencer, who opined on the cause of L.M.’s brachial plexus injury and who, from review of L.M.’s birth video, medical records, and applicable medical literature, concluded that Midwife Hamilton did not encounter a shoulder dystocia or use excessive traction, and thus L.M.’s BPI must have been the result of NFOL. It was the defense medical experts, not Dr. Tencer, who undertook the differential diagnosis Freeman claims was necessary, *see Freeman Br. at 4-10*, and who considered the possible plausible real world causes of L.M.’s injury and, based on L.M.’s birth video, excluded plaintiff’s proffered cause – excessive traction – leaving NFOL as the likely cause. And, contrary to Freeman’s assertions, *Freeman Br. at 5, 18-20*, as the defense medical experts made clear,<sup>5</sup> there is ample

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<sup>4</sup> Nor, as Freeman claims, *Freeman Br. at 15-16*, did Dr. Tencer use “average person” studies “to speculate either about how much force might have been applied to LM by his mother pushing, or by the defendant midwife pulling.”

<sup>5</sup> *See* 10/28 RP (DeMott) 11:11-21:9, 27:18-28:2, 28:23-29:15, 68:15-69:5, 84:4-11, 94:12-95:1; CP 4981-82, 4985-86 (Collins). Even L.M.’s experts admitted that NFOL can cause fractured clavicles and tailbones, as well as some BPIs, 10/21 RP (Mandel) 88:2-25, 89:1-12; 10/22 RP (Glass) 87:8-13, 89:4-5, 104:23-25, 120:4-7; acknowledged case reports of permanent BPIs occurring without shoulder dystocia, with C-sections, and in cases where the birth attendant was not touching the patient, 10/21 RP (Mandel) 87:17-19, 119:3-21; 10/22 RP (Glass) 13:18-19, 115:11-25; and admitted the absence of literature stating that only traction, as opposed to NFOL, can cause avulsion or rupture BPIs. 10/21 RP (Mandel) 90:20-91:5; 10/22 RP (Glass) 120:10-15. Dr. Mandel also acknowledged that literature references to permanent BPIs caused by NFOL include avulsions, ruptures, and bad stretch injuries. 10/21 RP (Mandel) 117:7-21, 118:7-11.

literature support for the conclusion that NFOL can cause permanent BPIs – which include ruptures and avulsions.<sup>6</sup>

Second, Freeman cites no authority supporting his argument, *Freeman Br. at 6-10*, that only epidemiology and differential diagnosis, not biomechanical engineering calculations, are proper scientific mechanisms for determining causation of an injury. Even the Federal Judicial Center, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (3d. ed. 2011),<sup>7</sup> cited by Freeman, *Freeman Br. at 5*, does not suggest that engineers are per se incapable of determining or testifying about whether certain forces are capable of causing certain types of injuries. Rather, its “Reference Guide on Engineering,” see REFERENCE MANUAL at 897-959, recognizes that engineers may “testify about various aspects of a party’s damages and give an opinion about whether those damages were caused by the conduct in question.” *Id.* at 942. And, while *Etherton v. Owners Ins. Co.*, 829 F. 3d 1209 (10<sup>th</sup> Cir. 2016), also cited by Freeman, *Freeman Br. at 9-10*, approved

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<sup>6</sup> Although Freeman asserts, *Freeman Br. at 5*, that the medical literature is not silent on the cause of brachial plexus avulsion, experts for both sides acknowledged that the literature speaks only in terms of permanent or persistent BPI, without breaking those permanent or persistent BPIs into subcategories of avulsions or ruptures. While L.M.’s medical experts emphasized the absence of any specific case report of a brachial plexus avulsion resulting from NFOL, the defense medical experts emphasized, and L.M.’s experts acknowledged, the absence of any literature suggesting that a brachial plexus rupture could not be caused by NFOL. See 10/28 RP (DeMott) 27:18-28:2, 68:15-23, 84:4-11, 94:12-95:1; CP 4981-82 (Collins); 10/21 RP (Mandel) 90:20-91:5; 10/22 RP (Glass) 120:10-15.

<sup>7</sup> See <https://www.fjc.gov/sites/default/files/2015/SciMan3D01.pdf> (last visited Oct. 23, 2018), for a link to the Federal Judicial Center, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (3d.ed. 2011).

the use of differential diagnosis as a proper method of determining injury causation under *Daubert*,<sup>8</sup> that case says nothing to suggest that biomechanical engineering studies or calculations have no scientifically accepted utility in injury causation analysis.

Third, again erroneously claiming that Dr. Tencer hypothesized that NFOL caused L.M.'s BPI, Freeman asserts, *Freeman Br. at 10*, that he “developed his hypothesis about the cause of LM’s injury via abductive reasoning,” as if there is something wrong with using abductive reasoning. Not only is Freeman’s underlying premise as to the substance of Dr. Tencer’s testimony incorrect, but also Freeman’s criticism of the use of abductive reasoning misplaced. With abductive reasoning, which involves “a syllogism in which a major premise is evident but the minor premise and therefore the conclusion is only probable,” one takes away the best, or most probable, explanation.<sup>9</sup> In fact, the making of a medical diagnosis through the use of differential diagnosis, which even Freeman acknowledges is a generally accepted methodology, is an application of abductive reasoning.<sup>10</sup>

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<sup>8</sup> *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993).

<sup>9</sup> <https://www.merriam-webster.com/words-at-play/deduction-vs-induction-vs-abduction> (last visited Oct. 23, 2018).

<sup>10</sup> <http://www.butte.edu/departments/cas/tipsheets/thinking/reasoning.html> (last visited Oct. 23, 2018).

Fourth, Freeman himself engages in the same faulty logic of which he accuses Dr. Tencer (who did not even attempt to testify to the cause of L.M.'s BPI) when he attempts to suggest, *Freeman Br. at 9, 12*, that because there is literature stating that shoulder dystocias attended by midwives, corpsmen, nurses, or osteopaths, as opposed to MD obstetricians, have an increased risk (which for midwives, corpsmen, and nurses "did not quite reach significance")<sup>11</sup> of neonatal BPIs, or that because most vaginal births, with or without shoulder dystocia, don't result in BPIs or avulsion BPIs, then something more than giving birth, such as excessive traction by the birth attendant, must cause or contribute to them. Neither of those propositions entitle one to leap, without more information, to the conclusion that Midwife Hamilton necessarily caused L.M.'s BPI. Indeed, Freeman's suggestions in that regard ignore the evidence that the jury was entitled to credit that, as shown by L.M.'s birth video, Midwife Hamilton did not encounter a shoulder dystocia or apply excessive traction, and as shown in the medical literature, there are cases involving permanent BPIs, which necessarily include ruptures and avulsions, where the birth attendant did not apply any traction to deliver the infant.

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<sup>11</sup> McFarland, Dr. Lynne V., *et al*, *Erb/Duchenne's Palsy: A Consequence of Fetal Macrosomia and Method of Delivery*, 68 *OBSTETRICS & GYNECOLOGY* 784, 786 (1986), cited by Freeman, *Freeman Br. at 11*, but without any mention by Freeman of the lack of statistical significance of the purported increased risk with midwives, corpsmen, and nurses.

#### IV. CONCLUSION

Neither WSAJF nor Freeman establish that the trial court abused its discretion under ER 702 or erred under the general acceptance test of *Frye* in allowing Dr. Tencer's expert testimony. The Court of Appeals correctly affirmed the trial court's evidentiary rulings and judgment on the jury's defense verdict, and this Court should do the same.

RESPECTFULLY SUBMITTED this 23rd day of October, 2018.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 23rd day of October, 2018, I caused a true and correct copy of the foregoing document, “Respondent Hamilton’s Answer to Amici Curiae Briefs of Washington State Association for Justice Foundation and Dr. Michael D. Freeman” to be delivered in the manner indicated below to the following counsel of record:

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