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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT SEATTLE

8 YESENIA PACHECO, *et al.*,

9 Plaintiffs,

10 v.

11 UNITED STATES OF AMERICA,

12 Defendant.

Case No. C15-1175RSL

ORDER GRANTING IN PART  
DEFENDANT'S MOTIONS IN  
LIMINE

13 This matter comes before the Court on “Defendant’s Motions in Limine.” Dkt.  
14 # 114. Having reviewed the memoranda and declaration submitted by the parties, the  
15 Court finds as follows:

16 **A. Deposition Testimony of Plaintiffs’ Witnesses**

17 Defendant seeks to preclude plaintiffs from offering the deposition testimony of  
18 Yesinia Pacheco and their expert, Dr. Harold Zimmer, at trial. According to plaintiffs’  
19 pretrial statement, they anticipate calling both witnesses live during the presentation of  
20 their case-in-chief. Plaintiffs have not identified any rule of evidence or civil procedure  
21 that authorizes the use of depositions in these circumstances. See *Mazloun v. D.C.*  
22 *Metro. Police Dep’t*, 248 F.R.D. 725, 727 (D.D.C. 2008) (acknowledging the  
23 “unremarkable proposition that a party cannot introduce the deposition testimony of a  
24 witness (other than for impeachment purposes) who will, in fact, be present and giving  
25 live testimony at trial.”).

1 Plaintiffs argue, however, that the Court should relax the rules of evidence and  
2 allow both parties to submit hearsay evidence in the form of deposition testimony in order  
3 to more efficiently try the liability issues. Absent a more particularized showing regarding  
4 the nature of the deposition testimony at issue and the surrounding indicia of its  
5 reliability, the Court declines to adopt such a procedure. Hearsay testimony raises  
6 reliability concerns that can be avoided through live testimony: if an established  
7 exception to the hearsay rule does not apply, the party offering the evidence must make a  
8 particularized showing of trustworthiness. See U.S. v. Murillo, 288 F.3d 1126, 1137 (9th  
9 Cir. 2002). Plaintiffs have not done so on the record before the Court.

10 Defendant's first motion in limine is GRANTED.

#### 11 **B. Evidence of Inadequate Recordkeeping**

12 Plaintiffs allege that employees of NeighborCare Health were negligent in the  
13 provision of medical care to Yesenia Pacheco. The negligent acts and/or omissions  
14 recited in the Amended Complaint include the failure to adequately record Ms. Pacheco's  
15 medical treatments and consents, which plaintiffs contend contributed to the  
16 "miscommunication" that led to her receiving a flu shot rather than a Depo Provera  
17 injection on September 30, 2011. Defendant asserts that there is no causal connection  
18 between the alleged recordkeeping deficiencies and plaintiffs' injuries. Dkt. # 114 at 3-4.  
19 Causation is a disputed issue of fact which the Court will not resolve in the context of a  
20 motion in limine.

21 Defendant also seeks to exclude evidence and argument regarding the state of Ms.  
22 Pacheco's medical records on the ground that any recordkeeping failure must have been  
23 on the part of NeighborCare Health, as a corporate entity, and not on the part of its  
24 individual employees. Defendant argues that the government cannot be held liable under  
25 the Federal Tort Claims Act ("FTCA") when a claim is based on state law that would  
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1 hold only a corporation - and not an individual person - liable. Dkt. # 117 at 3.<sup>1</sup> Based on  
2 these premises, defendant seeks to preclude plaintiffs from arguing that alleged  
3 deficiencies in NeighborCare Health’s documentation of Ms. Pacheco’s past medical  
4 treatments and/or her consent to the flu shot give rise to liability on the part of the United  
5 States.

6 Defendant’s premises are faulty in that they appear to be based on an assumption  
7 that (1) a claim under RCW 7.70.030 lies only against a corporation and/or (2) plaintiffs  
8 have alleged that the clinic was negligent. Neither assumption is supported. An individual  
9 health care provider who fails to satisfy the accepted standard of care can be held liable  
10 under the relevant state law, RCW 7.70.030. Defendant expressly acknowledges that  
11 plaintiffs have not alleged corporate negligence (Dkt. # 114 at 3): rather, their claim is  
12 that NeighborCare Health’s employees, acting within the scope of their employment,  
13 were negligent and liable under governing state law. In the context of this case, the  
14 United States has not shown that it is entitled to immunity from claims that involve  
15 recordkeeping failures.

16 Defendant’s second motion in limine is DENIED.

17 **C. Post-Incident Remedial Measures**

18 Defendant seeks to exclude evidence of training provided to NeighborCare Health  
19 employees that was prompted by the incident that gave rise to this litigation. Federal Rule  
20 of Evidence 407 makes evidence of post-incident remedial measures inadmissible in order  
21 to prove negligence. The training at issue is exactly the type of measure “that would have  
22 made [plaintiffs’] earlier injury or harm less likely to occur,” and plaintiffs offer no

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24 <sup>1</sup> The FTCA waves sovereign immunity for injuries “caused by the negligent or wrongful  
25 act or omission of any employee of the Government while acting within the scope of his office or  
26 employment, under circumstances where the United States, if a private person, would be liable to  
the claimant in accordance with the law of the place where the act or omission occurred.” 28  
U.S.C. § 1346(b)(1).

1 logical reason why Rule 407 should not apply in this case. Plaintiffs will not be permitted  
2 to introduce evidence of subsequent training to prove culpable conduct.

3 Defendant's third motion in limine is GRANTED.  
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5 Dated this 7th day of January, 2020.

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7 Robert S. Lasnik  
8 United States District Judge  
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