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IN THE SECOND JUDICIAL DISTRICT COURT  
IN AND FOR DAVIS COUNTY, STATE OF UTAH

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TIMOTHY D. SYMES

Plaintiff.

vs.

SHANICE C. BURCH, an individual;  
LUBE MANAGEMENT CORP., a Utah  
Corporation; and JOHN DOES 1-10

Defendants.

**REPLY MEMORANDUM IN  
SUPPORT OF MOTION IN  
LIMINE NO. 5 RE:  
UNRELATED ISSUES  
REGARDING DR.  
SCHWEBACH**

Civil No. 180701236  
Honorable Michael Direda

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Defendants Shanice Burch and Lube Management Corp., by and through their counsel of record, respectfully submit the following Reply Memorandum in support of their Motion in Limine No. 5: Adam Schwebach.

## **STATEMENT OF NEW MATERIAL**

Mr. Symes argues that these issues go to Dr. Schwebach's credibility and that Rule 608 permits their admission.

## **ARGUMENT**

### **EVIDENCE OF THE ORDER AND REPRIMAND SHOULD BE EXCLUDED**

Mr. Symes contends that these alleged ethical violations go to Dr. Schwebach's credibility and qualification to serve as an expert witness. However, as found by Judges Chon and Johnson, the information is not relevant and is unduly prejudicial. Specifically, Mr. Symes argues that the evidence is admissible under Rule 608 of the Utah Rules of Evidence which allows extrinsic evidence of conduct to support a witness's character for truthfulness.

Neither of these instances raise concerns as to Dr. Schwebach's truthfulness. As to the UPPAC Board Report, the investigator did not find or suggest that Dr. Schwebach was not truthful in his dealings with the students. Rather, the concern was that the investigator "did find information on three students in Weber District who received services at Dr. Schwebach's private office that could have been received for free through the district." (UPPAC Report, p. 1). The investigator did not find that Dr. Schwebach was not credible, but rather that he may have a conflict of interest on dealing with these students.

As for the Order issued by Judge Kelly, while Mr. Symes relies upon the original order, he ignores the fact that when Dr. Schwebach appeared before the court and explained what occurred, the court specifically declined to hold Dr. Schwebach in contempt or issue any sanction against him personally.

Moreover, in her order in *Laroque v. Sherrow*, Judge Kristine Johnson considered the same arguments raised by Mr. Symes here and concluded:

Under the Rule, “extrinsic evidence is not admissible to prove specific instances of a witness’s conduct in order to attack or support the witness’s character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of (a) the witness. . . .” The question, then, is whether Dr. Schwebach’s violation of Judge Kelly’s Order and/or his ethical violations with respect to student charges are “probative of [his] character for truthfulness or untruthfulness.” While those violations may well raise questions regarding Dr. Schwebach’s compliance with ethical standards, they do not directly pertain to his truthfulness or lack thereof. While he violated Judge Kelly’s Order not to speak to a minor’s parents and violated an ethical standard regarding charges, neither specifically demonstrates a lack of candor. There are also Rule 403 concerns at play. The case before Judge Kelly has no relation to this case or to the Rule 35 examination conducted here. Yet, there is a risk that the jury would erroneously conclude that Dr. Schwebach violated an Order of this Court, or that his examination was improper because of the violation in that case.

Here, Mr. Symes has not claimed that Dr. Schwebach committed any improprieties in the conduct of his examination of Mr. Symes, nor has he claimed there was any conflict-of-interest present in this case. The same Rule 403 concerns are present here as in *Laroque*. The evidence has scant relevance because Mr. Symes

does not challenge the manner in which the medical examination was conducted, but the jury is apt to draw an unfair conclusion that Dr. Schwebach acted improperly here based on allegations of impropriety in another case.

### **CONCLUSION**

Based on the foregoing, Defendants Shanice Burch and Lube Management Corp., respectfully moves the Court for a Motion in Limine for an Order excluding any reference or mention of the exclusion of Dr. Schwebach's testimony in an unrelated civil matter.

DATED this 3<sup>th</sup> day of May, 2022.

MORGAN, MINNOCK, RICE & MINER, L.C.

/s Joseph E. Minnock  
Joseph E. Minnock  
Attorneys for Defendants Shanice C. Burch and  
Lube Management Corp.

## CERTIFICATE OF SERVICE

I hereby certify that on this 3<sup>rd</sup> day of May 2022, I served an electronic copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF MOTION IN LIMINE NO. 5 RE: UNRELATED ISSUES REGARDING DR. SCHWEBACH** on the following:

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/s Joseph E. Minnock \_\_\_\_\_