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

TIMOTHY D. SYMES; and AMY SYMES

Plaintiffs.

vs.

SHANICE C. BURCH, an individual; LUBE
MANAGEMENT CORP., a Utah Corporation;
PARTSCO, L.C., d/b/a MIGHTY AUTO
PARTS; and JOHN DOES 1-10

Defendants.

**PLAINTIFF’S OPPOSITION TO
DEFENDANTS’ MOTION IN LIMINE NO. 5
RE: UNRELATED ISSUES REGARDING
DR. SCHWEBACH**

Case No. 180701236
Judge Michael Direda

Plaintiffs Timothy D. Symes, and Amy Symes (“Plaintiffs”) hereby submit this
Opposition to Defendants’ Motion in Limine No. 5 Re: Unrelated Issues Regarding Dr.
Schwebach (the “MIL”) as follows:

PREFERRED DISPOSITION AND GROUNDS

The Motion should be denied. Defendants ask the Court to preclude Plaintiffs at trial from “introducing any evidence or argument suggesting, implying, or referring in any way to the order in which Dr. Schwebach was excluded as an expert or to an administrative reprimand Dr. Schwebach received in 2017.” (Def’s Mot. at p. 2.) Defendants rely on Utah Rules of Evidence 402 and 403, but in so doing, Defendants fail to recognize that Schwebach’s violations of prior court orders and the ethical standards of his profession go to his qualifications as an expert witness in this case and his credibility. Just as a rejected dissertation, a failed board certification, or a revoked license are relevant to an expert’s qualifications, his ethical violations in how he conducts exams and assessments are also relevant to his qualifications and experience. Additionally, the information he seeks to preclude may be inquired in to on cross examination under Rule 608 without being admitted into evidence. These issues are highly probative of Dr. Schwebach’s truthfulness and credibility may be inquired into on cross-examination. Therefore, the Motion should be denied.

FACTS

1. On September 1, 2021, the Honorable Judge Keith Kelly entered an Order on Plaintiffs’ Motion for Rule 37 Sanctions Re: Adam Schwebach, PH.D.’s Rule 35 Examination (the “Order”), in *Robert Hale et al. v. The University of Utah et al.*, case No. 180908153 here in the Third District (the “Hale Court”). (See the Mot., Ex. A.) Earlier in that case, Judge Kelly set forth guidelines for a Rule 35 exam: Defendants requested a Rule 35 examination of Hannah, which the Court granted in its March 9, 2020, Order Granting Defendants’ Joint Motion for Rule 35 Examinations of Hannah Hale. Paragraph 4(b) of the Order stated, “One of Hannah’s parents, either Lisa Hale or Robert Hale, may accompany Hannah Hale to the examination on the

condition that said parent is merely there to accompany Hannah. The parent may not interrupt, respond, give signs, or in any way participate in or testify during the examination, testing or any interview.” Paragraph 4(d) of the Order stated, “The Court will consider sanctions for any such violation of this Order.” (The Order, Mot., Ex. A, ¶¶ 2–4 (emphasis added).)

2. The Hale Court found that “Dr. Schwebach started out the exam in knowing violation of the Order:” In paragraph 8 of the Declaration, Dr. Schwebach admits that he received a copy of the Court’s March 9, 2020 Order on July 22, 2020. . . . In paragraph 10 of the Declaration, Dr. Schwebach admits that, “On August 4, 2020, I spoke with Defense Counsel. Counsel informed me that Hannah’s parents should not be in the room with her during the examination and that I should interview and test only Hannah.” In paragraph 14 of the Declaration, Dr. Schwebach quotes extensively from his interview with Hannah’s parents in which, among other things, he makes the following statements: “I’ve been asked to do what’s called an independent medical examination;” “I really want to go into this as independent as possible. I want to hear from you guys first hand, just like you would be coming into my office for the first time;” “I don’t know the situation, so I’m going to ask you guys about that. That’s why I think it’s probably helpful that your parents are here, ‘cause they can give us some information and help, kind of, along this process.” These statements lead the Court to find that Dr. Schwebach started out the exam in knowing violation of the Order. (*Id.* ¶¶ 7–11 (emphasis added).)

3. The Hale Court found that Dr. Schwebach “appeared to be playing dumb” when he acted “as though he hadn’t read the order:” [] Mrs. Hale[] states, “She was staying - - we were told we’re not supposed to talk though. It was just supposed to be her.” Dr. Schwebach replied by saying “Oh? Only you? Okay, that’s fine.” This exchange leads the Court to find that Dr.

Schwebach was acting as though he hadn't read the order, when in fact he had. He appeared to be playing dumb. (*Id.* ¶¶12–13 (emphasis added).)

4. The Hale Court also found that Dr. Schwebach intended to mislead the parents and violate the prior court order: On Page 4 of Dr. Schwebach's Report, he stated, "It is important to note that Mr. and Mrs. Hale reported to this examiner that they were specifically instructed not to provide information during the course of the examination. Regardless, this examiner attempted to gain additional information in regards to Ms. Hale's early developmental history and her symptom presentation immediately following her stroke. Mr. and Mrs. Hale were gracious in providing additional insight in regard to Ms. Hale's circumstances and her ongoing challenges." The Court finds this statement in the Report to reveal Dr. Schwebach's intent to mislead the Hales and violate the Court's Order. . . . The Order was very specific that the parents were not to be questioned, but Dr. Schwebach was effectively conducting an ex parte deposition of the parents. He was obtaining data he was not entitled to obtain. (*Id.* ¶¶ 18–19 & 22 (emphasis added).)

5. In light of these facts and others, the Hale Court found: The Court finds by clear and convincing evidence that Dr. Schwebach had the ability to comply with the Order. The Court finds that Dr. Schwebach knowingly and intentionally violated the Court's Order. This was not negligent conduct. The Court finds that Dr. Schwebach's violation of the Court's Order was not substantially justified. (*Id.* ¶¶ 25–27 (emphasis added).) The Court concludes that Dr. Schwebach's knowing and intentional violation of the Court's Order was so egregious that sanctions are appropriate. . . . The Court will issue a separate Order to Show Cause requiring Dr. Schwebach to appear and explain why he should not also be personally held in contempt for violating the Court's Order. (*Id.* at 7–8 (emphasis added).)

6. This, however, is not the first time Dr. Schwebach faced reprimands for ethical violations. On September 19, 2017, the Utah Professional Practices Advisor Commission (“UPPAC”) reviewed and investigated complaints against Dr. Schwebach and issued a Board Report which states in relevant part: Dr. Schwebach is a school psychologist in Weber School District and also has a private practice. On at least three occasions from 2012 to 2014, Dr. Schwebach performed services through his private practice for patients who were also students in Weber District. Many of the evaluations and assessments provided could have been provided for free through the district special education department, but Dr. Schwebach charged a fee for the services. This created a conflict between Dr. Schwebach’s private interest and his public duties, which is prohibited by Utah law. . . . In addition, licensed educators are required to be familiar with professional ethics and comply with “applicable professional standards,” Rule R277-515-3(2). The National Association of School Psychologists publishes a set of ethical standards called Principles for Professional Ethics, which includes the following language in Standard III.4.9: School psychologists who provide school-based services and also engage in the provision of private practice services (dual setting practitioners) recognize the potential for conflicts of interests between their two roles and take steps to avoid such conflicts. Dual setting practitioners: • are obligated to inform parents or other potential clients of any psychological and educational services available at no cost from the school is prior to offering such services for remuneration • may not offer or provide private practice services to a student of a school or special school program where the practitioner is currently assigned (Ethical Violation Report, Ex. 1 hereto.) The hearing on the order to show cause will be held in December.

7. On October 18, 2017, based upon that report, a letter of reprimand was sent and placed in Dr. Schwebach’s employment file. The letter states in relevant part: At its October 12,

2017, meeting, the Utah State Board of Education discussed the allegation that you charged for evaluations and assessments that could have been provided for free through the district special education department. The Board approved UPPAC's recommendation that you receive a Letter of Reprimand. As a licensed educator your actions should be consistent with the educator standards contained in Utah Admin. Code R277-515. A licensed educator should take great care to avoid conflicts of interest between the educator's public education employment and private business activities. In addition, as a psychologist, you are also expected to be familiar with and comply with the ethical standards published by the National Association of School psychologists. It is the sincere hope of the Commission members and the State Board that you comply with all ethical standards in future educational endeavors. (Letter of Reprimand, Motion Ex. B.) Unfortunately, as seen by the Order, Dr. Schwebach did not comply with all ethical standards after this reprimand.

8. Dr. Schwebach was later questioned about this reprimand in another case in which he acted as an expert witness and signed a statement which read: "I was reprimanded by the Utah State Board of Education for Charging the Families of Students for Services I offered in my private practice that the child could have received for free from the school district." (Schwebach Dep. Tr., Ex. 15, at 112, Ex. 3 hereto (emphasis added).) In that same deposition, he signed a statement admitting that a statement in his expert report was not true: "In my report I indicated that Stephanie said her nightmares began at the point of her second accident, but that is not true." (*Id.* Ex. 11, at 84, Ex. 3 hereto.)

ARGUMENT

I. DR. SCHWEBACH'S VIOLATIONS GO TO HIS QUALIFICATIONS AS AN EXPERT.

Dr. Schwebach's violations of prior court orders and the ethical standards of his profession go to his qualifications as an expert witness in this case and his ability to testify truthfully. Having offered his expert opinion, the witness exposes himself to interrogation which ordinarily would have no place in the cross-examination of a factual witness, but the expert exposes himself to the most searching kind of investigation into his qualifications, the extent of his knowledge and the reasons for his opinion, including the facts and other matters upon which it is based. *Whitehead v. Am. Motors Sales Corp.*, 801 P.2d 920, 924 (Utah 1990) (quoting *Chrysler Corp. v. Todorovich*, 580 P.2d 1123, 1133 (Wyo. 1978)). Defendants will present Dr. Schwebach as a credible and qualified expert at trial and will ask the jury to believe his claim that he properly conducted a Rule 35 examination of Mr. Symes. But, just as a rejected dissertation, a failed board certification, or a revoked license are relevant to an expert's qualifications, Dr. Schwebach's past ethical and legal violations in how he conducts exams and assessments go directly to his qualifications as an expert and the reliability of his findings. *See* Utah R. Evid. 702(b)(1) & (2). Dr. Schwebach's violation of court orders governing Rule 35 exams and his violations of the rules of ethics and Utah law governing the assessments he performs on patients are related to the expertise he claims to have in this case. Dr. Schwebach is a neuropsychologist who conducted a Rule 35 exam of Mr. Symes and will testify about his alleged findings at trial. It was during his performance of a prior Rule 35 exam in the *Hale* case when Dr. Schwebach blatantly violated a court order in an effort to obtain information he was not entitled to and then used that information in his final report. (Statement of Facts ("SOF"))

Nos. 1–5.) And it was during his performance of his duties as a school psychologist that he ignored clear conflicts of interest in violation of ethical guidelines for school psychologists.

Now, Dr. Schwebach intends to take the stand at trial and testify that he conducted a Rule 35 exam and reached conclusions therefrom which complied with all necessary ethical and legal rules. Plaintiffs, therefore, should be able to attack that claim on cross-examination. *See Carbaugh v. Asbestos Corp. Ltd.*, 2007 UT 65, ¶ 19, 167 P.3d 1063 (“Licensing standards are relevant to expert eligibility under rule 702 of the Utah Rules of Evidence but not determinative of it.”); *State v. Zeigler*, Case No. M2017-01091-CCA-R3-CD, 2019 WL 484647, at *19 (Tenn. Crim. App. 2019) (“The primary purpose of informing the jury that the State’s expert witness’s license had been suspended at the time he performed the evaluation bears on the expert’s credibility and is not contrary to the underlying goals of Rules 401 and 403. Under these circumstances, we conclude that the State failed to carry its burden in establishing exclusion of the expert’s license suspension.”)

Dr. Schwebach’s past misconduct is relevant to his qualifications and reliability as an expert in neuropsychology in this case. Defendants may present evidence about the number of journal articles Dr. Schwebach authored, how many exams he conducted, where he worked, and which school he graduated from. Plaintiffs, however, may then attack his qualifications through past instances in which his actions as a neuropsychologist fell below the standards he is required to meet. An expert’s inability to comply with the ethical standards governing assessments about which he intends to testify at trial speaks directly to his qualifications, and Plaintiffs should be allowed to inquire into those failings at trial.

Defendants argue that this “same motion” has been “twice made and granted by trial courts in this state.” (Def’s Opp. at p. 4.) This court, however, is not bound by any district court’s

prior rulings. Regardless, Defendants citation to the Order by Honorable Judge Kristine Johnson is incomplete. There, Judge Johnson, explicitly reserved her ruling on 702 grounds stating:

“Plaintiff’s ability to inquire into the events in question will hinge upon Dr. Schwebach’s testimony on direct examination. By way of example, if he testified that he always complies with applicable rules and orders, or that it is his practice to do so, then Plaintiffs would be entitled to probe that assertion with evidence to the contrary.” (*See* Def’s Ex. D.) Subsequently, the Court reserved any ruling on the Motion as it pertains to Rule 702. *Id.*

Defendants further rely on a court order from September 1, 2021, signed by Judge Su Chon allegedly excluding reference to the unrelated order, but not the administrative reprimand. The order, however, fails to address Rule 608 and 702, and without further information cannot be reliably applied to this case. Importantly, at minimum Plaintiffs are allowed to inquire into the Order and Administrative reprimand for purposes of impeachment.

II. RULE 608 ALLOWS INQUIRY INTO DR. SCHWEBACH’S ETHICAL VIOLATIONS.

Plaintiffs do not seek to admit extrinsic evidence of Dr. Schwebach’s past conduct to attack his character for truthfulness. Plaintiffs are, however, allowed to inquire into Dr. Schwebach’s various incidences of untruthfulness in legal and professional proceedings on cross-examination since these specific instances are probative of his character for untruthfulness. Under Rule 608(b), Utah Rules of Evidence: Except for a criminal conviction under Rule 609, 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: (1) the witness; or (2) another witness whose character the witness being cross-examined has testified about. Utah R. Evid. 608(b) (emphasis added). “Accordingly, rule

608 allows specific instances of conduct to be inquired into on cross-examination if they are probative of a witness' character for truthfulness.” *Robinson v. Taylor*, 2015 UT 69, ¶ 15, 356 P.3d 1230.

Rule 608 works in coordination with rule 609, which applies when attacking a witness's character for truthfulness by evidence of a criminal conviction.” Under both rules, specific instances of conduct are admissible for the purposes of attacking credibility. Conduct not resulting in a conviction may be inquired into on cross-examination under rule 608, while rule 609 allows evidence of conduct that has resulted in a conviction. *Id.* ¶ 16 (internal citations and quotation marks omitted) (emphasis added). This is allowed because “[i]t is axiomatic that an attack on the credibility of a party's witnesses may be conducted by the other party either by his own cross-examination of the witnesses or by calling other witnesses to accomplish that purpose.” *Bd. of Educ. of S. Sanpete Sch. Dist. v. Barton*, 617 P.2d 347, 350 (Utah 1980); see also Utah R. Evid. 611(b) (“Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility.”) (emphasis added). Defendants seeing that Dr. Schwebach's character for untruthfulness may come to light at trial, focuses on the Order's admissibility, arguing it is not admissible under Rules 402 and 403. In so doing, Defendants overlook the fact that these specific instances—those involving the Order and the Letter of Reprimand—which are not admissible as evidence, may still be inquired in to under Rule 608 on cross-examination because these specific instances are probative of Dr. Schwebach's character for truthfulness.

First, Dr. Schwebach violated ethical rules and Utah laws when, while working as a school psychologist and private psychologist, he charged students in his clinic for “evaluations and assessments he provided which could have been provided for free through the district special

education department . . . This created a conflict between Dr. Schwebach's private interest and his public duties, which is prohibited by Utah law." (SOF, Nos. 6–8.) These actions further raise an inference that Dr. Schwebach was not truthful with the parents of the students he was treating and unethically charging. Instead, Dr. Schwebach, presumably failed to disclose the fact that the student could receive the same services for free through the student's school district. As both a licensed educator and a psychologist, he was expected to be familiar with, and comply with, the professional ethical requirements of his profession. (*Id.* Nos. 6–7.) Just as lawyers are expected to recognize when a conflict of interest arises and are required to take steps to remove themselves from such situations, Dr. Schwebach knew that there were strict ethical rules and requirements prohibiting him from charging students for evaluations they could obtain for free, and yet he charged students for exams in his clinic that he should have performed at the schools. These acts, and Dr. Schwebach's failure to adhere to the ethical requirements of his profession, and his failures to inform the parents of these children are directly probative of his ability to truthfully testify at trial. This is particularly relevant to Dr. Schwebach's credibility where his failure to disclose was for his own financial gain.

At the end of the Letter of Reprimand, the Commission stated, "It is the sincere hope of the Commission members and the State Board that you comply with all ethical standards in future educational endeavors." (*Id.* No. 7.) Unfortunately, as demonstrated by Dr. Schwebach's blatant violations of a court order, Dr. Schwebach did not comply with all ethical standards in his future endeavors and now faces an order to show cause. The Order details acts by Dr. Schwebach which the court describes as blatant and knowing violations of a court order, acts of playing dumb in order to cause the parents of the individual to violate the Court order, and other statements revelatory of Dr. Schwebach's intent to mislead Mrs. Hales and violate the court's

order. (*Id.* Nos. 1–5.) Dr. Schwebach’s knowing, intentional, and blatant violation of a court order governing how he conducted an Independent Medical Exam, like the one he conducted in this case, is directly probative of his truthfulness and ethical compliance, or unethical noncompliance, with his duties as a witness and neuropsychologist. Therefore, these instances may be inquired in to on cross-examination.

CONCLUSION

Plaintiffs do not intend to seek admission of Dr. Schwebach’s past instances of untruthfulness, but Rule 608 allows Plaintiffs to inquire into these instances because they are probative of Dr. Schwebach’s character for truthfulness, and those past violations are relevant to Dr. Schwebach’s qualifications as an expert. Therefore, the Motion should be denied.

Dated this 22nd day of April 2022.

STEELE ADAMS HOSMAN

/s/ Jeff Steele

Jeffrey J. Steele
Justin Hosman
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 22, 2022 the foregoing was served on all counsel of record via the Court’s efilings system.

/s/ Jeff Steele

STEELE ADAMS HOSMAN