

Colin P. King (1815)

[cking@dkowlaw.com](mailto:cking@dkowlaw.com)

Peter W. Summerill (8282)

[psummerill@dkowlaw.com](mailto:psummerill@dkowlaw.com)

Walter M. Mason (16891)

[wmason@dkowlaw.com](mailto:wmason@dkowlaw.com)

DEWSNUP KING OLSEN WOREL

HAVAS MORTENSEN

36 South State Street, Suite 2400

Salt Lake City, Utah 84111

Telephone: (801) 533-0400

*Attorneys for Plaintiffs*

IN THE THIRD DISTRICT COURT SALT LAKE COUNTY, STATE OF UTAH	
JOSHUA AND JAMIE TERRY, INDIVIDUALLY AND AS THE HEIRS OF AND ON BEHALF OF THE ESTATE OF KYCIE TERRY, DECEASED,  <p style="text-align: center;">PLAINTIFFS,</p> v.  SOUTHWEST EMERGENCY PHYSICIANS, L.L.C. and MICHAEL O. TREMEA, M.D.,  <p style="text-align: center;">DEFENDANTS.</p>	<p><b>PLAINTIFFS' COMBINED MOTION          IN LIMINE AND MEMORANDUM          IN SUPPORT RE: TRIAL EVIDENCE          AND COMMENTARY</b></p>  Case No. 160907576  Judge Keith Kelly

During the course of civil trial recurring issues frequently arise concerning the admissibility of evidence, argument by counsel, or other similar matters. Plaintiffs move the

Court, before *voir dire* of the jury and for its order to be entered before *voir dire* of the jury, to address these issues.

This motion is made, generally, on the following grounds:

The matters set out on the following pages are immaterial, irrelevant, inadmissible and/or prejudicial. Admission of the matters set forth below would undermine and harm the integrity of the proceedings, even though the Court were to sustain an objection and instruct the jury not to consider such facts for any purpose. In all probability, any such situation could constitute grounds for a mistrial in spite of attempts by the Court to cure the situation. Ordering the jury to disregard interrogation, comments, and evidence on the subjects addressed by this motion would not cure any prejudice, but may rather reinforce the impact of such these matters on the minds of the jurors.

The following are set out as the items not to be disclosed to the jury by the attorneys for Defendants.

1. Any reference by Defendants' counsel to the fact that this motion has been filed, or any ruling by the Court has been made in response to this motion, suggesting or inferring to the jury that Plaintiffs have moved to prohibit proof or that the Court has excluded proof on any particular matter. Utah R. Evid. 401, 402 and 403.

GRANTED \_\_\_\_\_ AGREED TO BY COUNSEL \_\_\_\_\_

DENIED \_\_\_\_\_

2. Reference to the time or circumstances under which Plaintiffs employed attorneys or any reference to other attorneys employed by Plaintiffs but not involved in this trial is

prohibited. “We agree with [Plaintiff] that ... the time when she hired counsel was not relevant.” *Ottens v. McNeil*, 2010 UT App 237, ¶ 72, 239 P.3d 308, 331; *and*, Utah R. Evid. 401, 402 and 403, 504, 510.

GRANTED \_\_\_\_\_ AGREED TO BY COUNSEL \_\_\_\_\_

DENIED \_\_\_\_\_

3. Any reference to the extent to which the Plaintiffs’ attorneys specialize in personal injury or medical malpractice cases. Utah R. Evid. 401, 402 and 403.

GRANTED \_\_\_\_\_ AGREED TO BY COUNSEL \_\_\_\_\_

DENIED \_\_\_\_\_

4. Any reference that Plaintiffs have not called to testify any witness equally available by subpoena to both parties in this cause; and any reference or suggestion to the jury by argument or otherwise what would have been the testimony of any witness not actually called.

GRANTED \_\_\_\_\_ AGREED TO BY COUNSEL \_\_\_\_\_

DENIED \_\_\_\_\_

5. Any demands or requests by Defendants’ counsel before the jury for matters found or contained within files of the Plaintiffs or of Plaintiffs' attorney (which would include papers of the Plaintiffs, letters, pleadings, photographs, and all other documents or tangible items.)

GRANTED \_\_\_\_\_ AGREED TO BY COUNSEL \_\_\_\_\_

DENIED \_\_\_\_\_

6. Requesting or moving to admit expert reports. Expert reports are inadmissible in evidence. Expert reports may only be used for purposes of impeachment and/or cross-examination. Utah R. Evid. 801(d)(1)(A).

GRANTED \_\_\_\_\_ AGREED TO BY COUNSEL \_\_\_\_\_

DENIED \_\_\_\_\_

7. Any reference to settlement negotiations which have been undertaken between Plaintiffs and Defendants. Utah R. Evid. 408.

GRANTED \_\_\_\_\_ AGREED TO BY COUNSEL \_\_\_\_\_

DENIED \_\_\_\_\_

8. Any request in front of the jury to Plaintiffs’ attorneys to stipulate to the admissibility of any evidence or stipulate to any facts or matters. Utah R. Evid. 401, 402 and 403.

GRANTED \_\_\_\_\_ AGREED TO BY COUNSEL \_\_\_\_\_

DENIED \_\_\_\_\_

9. Any reference that Plaintiffs have received, have been entitled to receive, will receive, or will become entitled to receive benefits of any kind or character from a collateral source. *See, Wilson v. IHC Hosps., Inc.*, 2012 UT 43, ¶ 31, 289 P.3d 369 (indicating that “[u]nder the common law collateral source rule, a wrongdoer is not entitled to have damages, for which he is liable, reduced by proof that the plaintiff has received or will receive compensation or indemnity for the loss from an independent collateral source.”) Citing *Wilson* the Utah Court of Appeals again acknowledged the inadmissibility of “workers compensation, health insurance, and other sources of benefits.” *See, Avalos v. TL Custom*, 2014 UT App 156, ¶ 22.

Collateral source evidence also offends Utah R. Evid. 401, 402 and 403. Any reference or allusion to the following should be prohibited:

- 9.1. Benefits from collateral insurance coverage, including life, health and workers compensation proceeds.
- 9.2. Benefits from voluntary contribution by the employer of Plaintiffs including sick leave, family leave, or, vacation time.
- 9.3. Any reference to any collateral benefits received by the Plaintiffs from any person, entity or organization.
- 9.4. Benefits from any state or federal governmental programs including social security, Veteran's Administration benefits, tax exemptions, military medical benefits, public assistance/welfare, or Medicare or Medicaid.
- 9.5. The fact of any suit or the settlement or amount of settlement therein related to any third party claims arising out of the incident made the basis of this lawsuit.
- 9.6. Benefits from pensions or retirement plans.
- 9.7. Benefits from charitable organizations.
- 9.8. That a portion of Plaintiffs' cause of action may be a subrogation claim owned by an insurance company, state or federal governmental program.

GRANTED \_\_\_\_\_ AGREED TO BY COUNSEL \_\_\_\_\_

DENIED \_\_\_\_\_

- 10. Any reference, inference, or questions directed to how Plaintiffs may have used money or benefits received from a collateral source. Utah R. Evid. 401, 402 and 403.

GRANTED \_\_\_\_\_ AGREED TO BY COUNSEL \_\_\_\_\_

DENIED \_\_\_\_\_

11. Any reference that any recovery by the Plaintiffs either would or would not be subject to federal income tax or taxation. Utah R. Evid. 401, 402 and 403.

GRANTED \_\_\_\_\_ AGREED TO BY COUNSEL \_\_\_\_\_

DENIED \_\_\_\_\_

12. Any reference during trial to the effect or the impact of medical malpractice litigation, the medical malpractice insurance ‘crisis,’ ‘frivolous lawsuits,’ Defendants' claims history, the ‘burden’ of lawsuits generally or the effect of litigation or a judgment on Defendants because such topics are irrelevant, prejudicial, and should not be permitted at trial. Utah R. Evid. 401, 402 and 403. By this motion Plaintiffs do not waive, and expressly reserve, the right to inquire into the such issues during *voir dire* as they may reveal juror biases and prejudices.

GRANTED \_\_\_\_\_ AGREED TO BY COUNSEL \_\_\_\_\_

DENIED \_\_\_\_\_

13. Any bolstering statements of individuals or treating physicians indicating that they believe Defendants provide good medical care, employs ‘good doctors,’ ‘conscientious doctors’ or similar statements. Utah R. Evid. 401, 402, 403 and 405.

GRANTED \_\_\_\_\_ AGREED TO BY COUNSEL \_\_\_\_\_

DENIED \_\_\_\_\_

14. Any reference to any other claims or lawsuits (or to the settlements or judgments made therein) in which Plaintiffs’ have been involved, prior to or subsequent to the incident at issue in this lawsuit, whether the claim or suit arose out of this incident or some other. Utah R. Evid. 401, 402 and 403.

GRANTED \_\_\_\_\_ AGREED TO BY COUNSEL \_\_\_\_\_

DENIED \_\_\_\_\_

15. Any reference to or disclosure of a settlement agreement, the specifics of a settlement or reference to the fact of settlement between Plaintiffs and Intermountain Health Care (“IHC”) should be prohibited. See, Utah R. Evid. 401, 402, 403, 408. Plaintiffs anticipate that Defendants will cite *Slusher v. Ospital*, 777 P.2d 437 (Utah 1989) to support admission of settlement and settlement amounts with IHC in this case. However, *Slusher* explained that a trial court need not disclose the existence of such an agreement to the jury if the court finds that, “on facts particular to the case, such disclosure will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” *Id.* at 444. Nine years after *Slusher*, the trial court in *Child v. Gonda*, 972 P.2d 425, 428 (Utah 1998) declined to disclose the existence of a settlement agreement or its basic content to the jury. The trial court simply mentioned to the jury that the plaintiff and one of the tortfeasors had “resolved their differences.” *Id.* The Utah Supreme Court concluded that the trial court was correct and that *Slusher* did not require disclosure of anything more. *Id.* at 429. Likewise, in the instant case the court should only mention that Plaintiffs and IHC “resolved” their differences. But, the Court should mention this only if the Court finds such information admissible under Utah R.

Evid. 401-403. Specifically, no Defendant may be held liable for an amount greater than the percentage of fault attributed to them. *See*, Utah Code Ann. § 78-27-40. Accordingly, the fact of settlement lacks any probative value and serves only to mislead. Defendants cannot be held liable for any thing greater than the amount of fault assigned by the jury. By contrast, reference to the existence of a settlement with IHC can serve only to mislead and confuse a jury regarding liability, causing them to conclude that IHC must be at-fault or entirely at-fault since the settled and are no longer a party to the action. Finally, if the Court does permit disclosure, such disclosure should occur only through a limited jury instruction, not repeated references by the Defense. Discussion of the settlement by counsel may lead to presentation in an inappropriate manner intended to arouse passion or prejudice. Jury instructions are sufficient to convey the fact of resolution against a non-party.

GRANTED \_\_\_\_\_ AGREED TO BY COUNSEL \_\_\_\_\_

DENIED \_\_\_\_\_

16. Any reference, inference or questions directed to how Plaintiffs may have used money or benefits received from any settlement. Utah R. Evid. 401, 402 and 403.

GRANTED \_\_\_\_\_ AGREED TO BY COUNSEL \_\_\_\_\_

DENIED \_\_\_\_\_

17. Any reference that the Plaintiffs or heirs have been accused of, or found guilty of, any misconduct, traffic offenses, or criminal convictions. Utah R. Evid. 401-404, 608-609.

GRANTED \_\_\_\_\_ AGREED TO BY COUNSEL \_\_\_\_\_

DENIED \_\_\_\_\_



18. Testimony from Defendants' experts as to any opinion or subjects not previously expressed in their report or in the deposition of such expert, if a deposition has been taken. Utah R. Civ. P. 26 (2011).

GRANTED \_\_\_\_\_ AGREED TO BY COUNSEL \_\_\_\_\_

DENIED \_\_\_\_\_

19. Any use or reference to any documents, photographs, or any other tangible things not previously timely disclosed in initial disclosures, response, or supplementary response, to Plaintiffs' interrogatories or requests for production. Utah R. Civ. P. 26, 37.

GRANTED \_\_\_\_\_ AGREED TO BY COUNSEL \_\_\_\_\_

DENIED \_\_\_\_\_

20. Any reference to, or show to the jury of, any proposed exhibit, unless the same previously has been exhibited to Plaintiffs' counsel to determine its relevancy and objections to admissibility.

GRANTED \_\_\_\_\_ AGREED TO BY COUNSEL \_\_\_\_\_

DENIED \_\_\_\_\_

21. Any reference to a criminal trial burden of proof including, but not limited to, "finding Defendants guilty of malpractice," "sentencing Defendants to pay" or "finding Defendants innocent of negligence."

GRANTED \_\_\_\_\_ AGREED TO BY COUNSEL \_\_\_\_\_

DENIED \_\_\_\_\_

REQUESTED ORDER

The foregoing Motion in Limine by the Plaintiffs has been presented to and considered by the Court. Upon all files and proceedings herein, the separate paragraphs of the Motion are hereby granted, denied or agreed to as indicated immediately below each of the paragraphs above.

The attorney(s) for the Defendants are instructed:

- a. Not to interrogate witnesses concerning the prohibited items, or to mention to the jury in any manner those items, without Defendants' attorney first obtaining permission outside the presence and hearing of the jury; and,
- b. To personally admonish the Defendants and Defendants' witnesses to refrain from mentioning to the jury in any manner the prohibited items, without Defendants' attorney first obtaining permission outside the presence and hearing of the jury.

---

Judge Keith Kelly  
Third District Court

DATED this: April 5, 2021

/s/ Peter W. Summerill

Peter W. Summerill

Dewsnap | King | Olsen | Worel | Havas | Mortensen

*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

I, hereby certify that on this 5<sup>th</sup> day of April, 2021, I caused true and correct copies of  
**PLAINTIFFS' COMBINED MOTION IN LIMINE AND MEMORANDUM IN SUPPORT**  
**RE: TRIAL EVIDENCE AND COMMENTARY** to be served via the Court's e-filing system,  
upon the following:

Christian W. Nelson  
Brandon B. Hobbs  
Sean C. Miller  
NELSON NAEGLE, PLLC  
222 South Main Street, Suite 1740  
Salt Lake City, Utah 84101  
[cnelson@nelsonnaegle.com](mailto:cnelson@nelsonnaegle.com)  
[bhobbs@nelsonnaegle.com](mailto:bhobbs@nelsonnaegle.com)  
[smiller@nelsonnaegle.com](mailto:smiller@nelsonnaegle.com)

/s/ Carli Abernethy  
Paralegal for Peter W. Summerill