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FIFTH JUDICIAL DISTRICT COURT
IN AND FOR IRON COUNTY, STATE OF UTAH

DAVID HINSON Plaintiff, vs. DARRELL L. WILSON, M.D.; JARED C. COX, D.O.; KIMBERLY D. HAYCOCK, P.A.; and DOE INDIVIDUALS 1 through 10; and ROE ENTITIES 1 through 10, inclusive, Defendants.	**PLAINTIFF'S MOTIONS IN LIMINE NOS. 1-20** ***(Oral Argument Requested)*** Case No. 170500085 Judge JEFFREY C. WILCOX Tier 3

Plaintiff David Hinson ("David" or "Plaintiff") hereby submits the following Motions in Limine to exclude and limit the presentation of certain improper evidence at the time of the trial in the above-entitled matter, including, but not limited to the following:

1. **Any reference to the effects of lawsuits either generally or personally on hospitals or physicians or that there are too many lawsuits or a "medical malpractice crisis."**

Pursuant to Rules 401, 402 and 403 of the Utah Rules of Evidence, the Court should not allow comments or testimony relating to 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 or the public at large because such topics are irrelevant, unfairly prejudicial, and should not be permitted at trial. Allowing Defendants or their witnesses to testify as to litigation, time away from the office or the stress of the lawsuit only seeks to improperly invite the jury's sympathy and suggest to the jury that a verdict will have an undue impact on them and possibly on their access to medical care. If Defendants are permitted to testify regarding these matters, Plaintiff should be permitted to rebut by inquiring into the Defendants' insurance coverage for mitigation purposes.

2. **Suggesting that cases in general or that this specific case is "frivolous" or grouping this specific case with any other case(s) claimed to be "frivolous lawsuits."**

Inflammatory statements referencing "frivolous" lawsuits should be excluded pursuant to Utah R. Evid. 401, 402 and 403 as irrelevant and unduly prejudicial. Plaintiff would not normally make an argument regarding the use of any specific words but in medical negligence cases some words are so loaded and provoke such emotional response their use must be addressed. For example, the use of the infamous "McDonald's Coffee Case" is embedded in society's lexicon and evokes negative connotations. When uttered at trial, "frivolous" evokes all the negative connotations of a society gone mad. Such statements are meant to appeal to the jury's passions and are thus improper. Such highly charged references or innuendo should be barred.

3. **Any bolstering statements or arguments regarding a Defendants' character or reputation, including but not limited to, historical reputation in the community, why they became a healthcare provider or other self-serving statements.**

Pursuant to Rules 401, 402, 403 and 405 of the Utah Rules of Evidence, statements of individuals or treating physicians indicating that they believe a Defendant is a good or conscientious professional or similar statements are irrelevant, and admission of such statements would be inappropriate. Under Utah R. Evid. 405, evidence of reputation is only admissible when character or a trait of character is at issue or otherwise admissible. Whether a Defendant was "caring" or "compassionate" is not relevant. Such testimony says nothing about the Defendants' conduct on a specific occasion. Here, the character of Defendants is not at issue. Only their treatment of Plaintiff is at issue. Testimony regarding a Defendant's character is irrelevant to this case and any probative value it may have is substantially outweighed by its unfairly prejudicial nature. Accordingly, any such testimony or similar reference is inadmissible and should not be permitted at trial.

4. **References to the number or absence of other legal actions involving either party.**

Similar to the above argument, admitting argument or innuendo about the number or absence of claims against a Defendant is not relevant and a covert attempt to garner sympathy and unfairly prejudice the jury and should be barred pursuant to Utah R. of Evid. 401, 402 and 403.

5. **Defendants' charitable work or volunteer service.**

Admitting argument or innuendo about Defendants' charitable work or volunteer service is not relevant and a covert attempt to garner sympathy and unfairly prejudice the jury and should be barred pursuant to Utah R. of Evid. 401, 402 and 403.

6. **Any evidence indicating that a Defendant has provided similar treatment in the past without complication.**

Pursuant to Rules 401, 402, 403, 404 and 405 of the Utah Rules of Evidence, evidence indicating that a Defendant has provided similar treatment in the past without complication is irrelevant and admission of such evidence would be inappropriate. Under Utah R. Evid. 404(b), evidence of past acts "is not admissible to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character." Utah R. Evid. 404(b). Here, Defendants may attempt to show that they have provided similar treatment in the past without complication to infer that they must have acted properly in this case. Such evidence of past acts is inappropriate and inadmissible under the Utah Rules of Evidence. Such evidence would only distract the jury and influence them to render an improper decision. A Defendant's past acts are not at issue here. Statements regarding a Defendant's past treatment are irrelevant to this case and any probative value they may have is substantially outweighed by their unfairly prejudicial nature. Accordingly, Defendants should be precluded from producing any evidence indicating that they have provided similar treatment in the past without complication.

7. **Testimony by any expert that they spoke with their colleagues / other physicians and what their opinions are.**

Occasionally, a medical malpractice expert will, for sake of curiosity or uncertainty, review some of the case facts with colleagues. These colleagues are not retained and have never reviewed the depositions or medical records. They only receive a verbal report of a few facts recited from the perspective and recollection of the expert. Nevertheless, if such consultation is disclosed to the jury it can seem as though there is a consensus of expert opinion on the issue. It is unreliable and unduly prejudicial and should be excluded.

Although experts can rely on otherwise inadmissible evidence in forming their opinions "[i]f experts in the particular field would reasonably rely on those kinds of facts or data in

forming an opinion on the subject," Rule 703 limits the use of such information at trial: "if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect." The potential prejudicial effect in this instance is substantial.

The hearsay evidence is unreliable, unscientific, and prejudicial. It is based on a casual conversation and not on any scientifically valid sampling or methodology, review of the literature or polling of a sufficient number of physicians to arrive at a reliable result. As a result, it is doubtful that the opinion, to the extent based on these conversations, satisfies the reliability standards of Utah R. Evid. 702 that [1] the testimony is based upon sufficient facts or data, [2] the testimony is the product of reliable principles and methods, and [3] the expert has reliably applied the principles and methods to the facts of the case.

Further, such testimony implicitly interjects the colleagues as *de facto* experts in absentia who Plaintiff has no capacity to cross-examine regarding their experience, credentials, and understanding of the issues. Excluding the testimony works no hardship on Defendants. Their experts can still testify regarding their own experience, training, and research and their own review of the evidence. Accordingly, testimony by any expert that they spoke with their colleagues or other physicians, and what their opinions are should be excluded.

8. Any expert witness testimony from individuals other than those expert witnesses who have been properly designated.

Pursuant to Rules 26(a)(4) and 26(d) of the Utah Rules of Civil Procedure, the Court should preclude Defendants from offering expert witness testimony from any individual other than those expert witnesses who have been properly designated. Plaintiff has conducted the depositions of the properly designated experts and is prepared to oppose their opinion testimony.

Allowing Defendants to introduce expert testimony through any other witnesses would be contrary to the Utah Rules of Civil Procedure and highly prejudicial to Plaintiff. Therefore, Defendants should not be permitted to offer expert testimony from any individual other than those previously designated expert witnesses. Specifically, treating physicians should be limited to the fact-based opinions formed while they were caring for Plaintiff. Treating physician witnesses should not be permitted to offer opinions outside the scope of the care and treatment they provided to Plaintiff.

9. Any factual testimony from witnesses not properly identified.

Pursuant to Rules 26(a)(5) and 26(d) of the Utah Rules of Civil Procedure, the Court should preclude the Defendants from offering factual testimony from any witness other than those witnesses who have been properly designated or identified. Plaintiff has prepared for trial based on the expected testimony of those individuals properly identified as fact witnesses and are prepared to address such testimony. Allowing Defendants to introduce fact testimony through any other witnesses would be contrary to the Utah Rules of Civil Procedure and highly prejudicial to Plaintiff.

10. Any references to collateral source payments.

Defendants should be prohibited from making any direct or indirect references to any third-party benefit or payment on Plaintiff's behalf. This includes references to out-of-pocket expenses, insurance, and any other phrase or term that concerns a third-party payment made to or for the benefit of Plaintiff. References to collateral source payments suggest to the jury that the Plaintiff has already been compensated and are seeking a windfall. Such references are prejudicial, irrelevant, and inadmissible. Defendants may seek to suggest to the jury that

Plaintiff's damages should be diminished, or their claim considered frivolous by introducing evidence of actual out-of-pocket costs. This serves as nothing more than a back-door method of suggesting to the jury that Plaintiff's injuries were either not severe, or that he has insurance coverage that paid for most of her expenses. Such evidence is excludable pursuant to the collateral source rule. *See Wilson v. IHC Hospitals, Inc.*, 2012 UT 43, 289 P.3d 369. However, if Defendants are permitted to introduce such evidence, Plaintiff should be permitted to rebut by introducing similar evidence of Defendants' insurance coverage.

11. Any opinions regarding the standard of care from treating physicians.

Plaintiff seeks to prevent questions directed to treating physicians that suggest an opinion regarding the standard of care, such as:

"A bad outcome can occur even with the best of care, correct?"

"Did it appear that Defendant did everything he/she reasonably could?"

"An injury can occur even when the physician/nurse does everything appropriately, can't it?"

"Did you see anything that suggests substandard care?"

The foregoing types of questions, although not directed specifically at what Defendants did, solicit standard-of-care opinions from fact witnesses. Such opinions are inappropriate. The parties intend to call treating physicians and other care providers. Neither party has identified these witnesses as standard-of-care experts, nor has either party retained them as such. Standard-of-care opinions are not within the normal scope of treatment. Pursuant to Rule 26 of the Utah Rules of Civil Procedure, treating physicians should not be permitted to express, or even suggest, opinions regarding the standard of care. Moreover, pursuant Rules 401, 402 and 403 of the Utah

Rules of Evidence, such testimony would be irrelevant, prejudicial, and constitute duplicative and cumulative expert testimony.

12. Any arguments, statements, or testimony allocating fault to a non-party medical provider.

Plaintiff seeks to preclude Defendants from presenting or soliciting any arguments, statements, or testimony that might mislead the jury to believe that any non-party medical provider provided substandard medical care and treatment, thus causing, or contributing to Plaintiff's injury. Under Utah law, fault may be allocated to any party or non-party only if "there is a factual and legal basis" to support the allocation. *See* Utah Code Ann.§ 78B-5-818 (emphasis added). Accordingly, to allocate fault to a non-party medical provider, Defendants are required to show that the provider breached the applicable standard of care, and said breach, caused Plaintiff harm. In addition, questions that "depend upon knowledge of scientific effect of medicine . . . require expert testimony." *Ruiz v. Killebrew*, 2020 UT 6, ¶ 32, 459 P.3d 1005, 1013.

Furthermore, under Rule 9(l) of the Utah Rules of Civil Procedure, Defendants are required to provide notice of their intent to allocate fault to any non-party medical provider. This notice must include identifying information "including name, address, telephone number, and employer" information as well as "a description of the factual and legal basis on which fault can be allocated." Utah R. Civ. P. 9(l). Specifically, Rule 9(l) provides that any party seeking to allocate fault must provide notice of such intent within a reasonable time of discovering the factual and legal basis for such a claim, "but in no event later than 90 days before trial." *Id.*

In this case, Defendants have not (1) provided any notice of an intent to allocate fault to any non-party medical provider, nor (2) provided expert testimony to establish such fault. The

trial is set to begin on January 11, 2024 which is approximately 6 months from today's date. As such, the Court should not allow Defendants to widen the scope of the issues at trial without first providing proper notice based upon a factual and legal basis.

Defendants have not complied with Rule 9(l) in providing a factual and legal basis for their claim or identifying the provider. Nor have they provided expert testimony as to how the standard of care was breached and what harm caused Plaintiff's injury. As such, any argument, statements, testimony, other evidence, or insinuation that Plaintiff may have seen another healthcare provider and that this healthcare provider somehow acted negligently should be precluded.

Because Defendants have not provided timely notice or established the requisite expert testimony, Defendants should be precluded from presenting or soliciting any arguments, statements, testimony, other evidence, or insinuations that might mislead the jury to believe that these or any non-party medical provider provided substandard medical care and treatment, thus causing, or contributing to Plaintiff's injury.

13. Defendants' experts should be limited to the opinions expressed in their depositions.

The Utah Rules of Civil Procedure require a party to provide fair disclosure of their experts' anticipated trial testimony and opinions. To ensure an expert would not offer "surprise" testimony at trial, opposing counsel may elect to depose the expert or obtain a written report of the expert's opinions. Here, Plaintiff elected to depose Defendants' experts. Accordingly, Defendants' experts were "expected to be fully prepared on all aspects of his/her trial testimony at the time of the deposition." Utah R. Civ. P. 26(a)(3) advisory committee notes.

In *Daniels v. Gamma West Brachytherapy, LLC*, the Utah Supreme Court held that an expert was not allowed to provide "new and additional testimony" on information accessible to the expert prior to his deposition. 2009 UT 66, ¶¶ 55-56, 221 P.3d 256, 271-72. The Supreme Court also noted that the Utah Rules of Civil Procedure permit an expert to "supplement information contained in an expert's deposition if that expert is specially retained or employed for the litigation and if the information is 'incomplete or incorrect,'" but they do not allow a deponent "to alter what was said under oath." *Id.* (quoting *Albrecht v. Bennett*, 2002 UT App 64, ¶ 29, 44 P.3d 838).

The purpose of taking the depositions of Defendants' experts was to afford Plaintiff's counsel the opportunity to explore the scope and all foundational support for their opinions and criticisms. As the party electing to take the depositions, Plaintiff's counsel had the responsibility "to ask the necessary questions to 'lock in' the expert's testimony." Utah R. Civ. P. 26(a)(3) advisory committee notes. Having done so, Plaintiff has prepared for trial based upon the testimony and opinions offered during each expert's deposition. Allowing Defendants' experts an opportunity to review and supplement new information previously accessible to them prior to their deposition or permitting them to provide "new" or "additional" testimony would directly violate the disclosure requirements of Rule 26(a).

Plaintiff should not be surprised at trial with the experts having chosen their favorite theory or what they believe now to be most likely as Plaintiff was not able to examine the basis for such an opinion during their depositions. Plaintiff has prepared for trial based upon the testimony and opinions offered during each expert's deposition. Allowing Defendants' experts an opportunity to review and supplement new information previously accessible to them prior to

their depositions or permitting them to provide "new" or "additional" testimony would directly violate the disclosure requirements of Rule 26(a). Likewise, it would highly prejudice Plaintiff, waste the Court's time, and confuse the jury in violation of Rule 403 of the Utah Rules of Evidence.

14. Any statements or testimony speculating as to why another individual may or may not have said or done something.

Speculation as to why another individual may or may not have said or done something is irrelevant, unreliable, confusing, a waste of time and otherwise unfairly prejudicial. The only person that should be able to testify regarding why a particular person said or did something should be the person who actually made the statement or did the act in question. All others would be speculating. Speculative testimony from any other witnesses would be unreliable, irrelevant, confusing, a waste of time and otherwise unfairly prejudicial. Accordingly, any such statements or testimony should be barred pursuant to Utah R. Evid. 401, 402 and 403.

15. References to a criminal trial burden of proof including, but not limited to, "finding Defendants guilty of malpractice," "sentencing Defendants to pay a judgment," or "finding Defendants innocent of negligence."

This case is a medical negligence case. There is nothing about a medical negligence case that makes it a criminal case. Because there are no allegations of criminal conduct, no statement, reference, or innuendo should be made that attempts to elevate the burden required. Allowing any of the above language or inference would unfairly prejudice and confuse the jury and should be barred pursuant to Utah R. Evid. 401, 402 and 403.

16. Inflammatory statements in opening or closing argument.

While Plaintiff and Defendants should be allowed latitude in their opening or closing arguments, that latitude should not extend to counsel calling the jury's attention to material that

the jury would not be justified in considering in its verdict. For instance, Defendants should be precluded from making inflammatory claims of "jackpot justice," "runaway jury verdicts" or referencing the infamous "McDonald's Coffee Case." Such inflammatory statements are merely an attempt to appeal to the juror's passions and prejudices. Pursuant to Utah R. Evid. 401, 402 and 403, inflammatory language by counsel in opening and closing argument should be prohibited.

17. References to a person, party, or parties, who were originally named in this lawsuit, but may no longer be a party to the case.

References to the fact that there were additional Plaintiffs or Defendants in a lawsuit where there is no effort to allocate fault to that former party and no settlement are irrelevant and would unfairly prejudice and confuse the jury and should be barred pursuant to Utah R. Evid. 401, 402 and 403. Absent an effort to allocate fault or impeach a witness, references or statements identifying prior parties to the lawsuit that were dismissed would be made solely to suggest to the jury that Plaintiff is overly litigious or engaged in "shot gun" litigation. As this Court and the Parties recognize, discovery often results in the narrowing of the parties or defendants in litigation. Plaintiffs should not be punished for dismissing parties when he or she discovers information that demonstrates the party should be dismissed from the lawsuit. This should be encouraged.

18. Any statements or testimony arguing that the standard of care is different in Cedar City than the national standard.

Pursuant to Rules 401, 402, and 403 of the Utah Rules of Evidence, the Court should not allow arguments or testimony that the standard of care is different in Cedar City than the national standard because such arguments and testimony are irrelevant, unfairly prejudicial, and should

not be permitted at trial. Allowing Defendants to argue that the standard of care is different in Cedar City than what is required nationally is irrelevant and incorrect because in Utah, "doctors are held to a national standard of care."[1]

The Utah Supreme Court has adopted the "similar locality" rule, which is "but a specialized application of the standard of conduct so universally imposed by the law: of requiring the degree of care which the ordinary, reasonable, and prudent person would observe under the same or similar circumstances."[2] Arguments or testimony that the standard of care is different in Cedar City than the national standard are irrelevant and would only serve to unfairly prejudice the plaintiff, confuse the issues, mislead the jury, and waste time. Accordingly, any such argument or testimony is inadmissible and should not be permitted at trial.

19. Dr. Ward's testimony should be limited to the issue of causation only as previously ordered by the Court.

Defendants have designated Brad Ward M.D. ("Dr. Ward"), a spinal neurosurgeon to testify as a retained expert at trial. However, this Court has limited the testimony Dr. Ward can provide at trial to the issue of causation only.[3] Dr. Ward should therefore be precluded from testifying as to any issues at trial other than causation as previously ordered by the Court. Dr. Ward cannot opine as to other issues other than causation, including whether any party met the applicable standard of care, and the Court should preclude Dr. Ward from testifying at trial on any other issues other than causation as previously ordered.

20. Dr. Powell should be precluded from testifying at trial as previously ordered by the Court.

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[1] *Olsen v. Delcore*, No. 07-CV-334 TS, 2009 WL 3233712, at *1 (D. Utah Sept. 24, 2009) (citing *Swan v. Lamb*, 584 P.2d 814, 817 (Utah 1978)).
[2] *Jenkins v. Parrish*, 627 P.2d 533, 537 (Utah 1981) (*overruled on other grounds by State v. Baker*, 884 P.2d 1280 (Utah 1994)).
[3] *See* Order re: Motion to Exclude Irrelevant Expert Testimony of Amy Powell and Brad Ward.

Defendants have designated Amy Powell M.D. ("Dr. Powell"), a sports-medicine physician to testify as a retained expert at trial. However, this Court has determined Dr. Powell's testimony to be irrelevant to the claims and issues at trial.[4] Accordingly, the Court should preclude Dr. Powell from testifying at trial.

DATED this 3rd day of July 2023.

/s/*Ashton J. Hyde*
Ashton J. Hyde
YOUNKER HYDE MACFARLANE
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[4] *Id.*

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of July 2023, I caused to be served via the court's e-filing system or by email a true and correct copy of the **PLAINTIFF'S MOTIONS IN LIMINE NOS. 1-20** to the following:

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