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IN THE FIFTH JUDICIAL DISTRICT COURT – CEDAR CITY

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.	**DEFENDANTS' MEMORANDUM IN OPPOSITION TO CERTAIN MOTIONS IN LIMINE and STIPULATIONS TO CERTAIN MOTIONS IN LIMINE** CASE NO. 170500085 JUDGE JEFFREY C. WILCOX TIER 3

Defendants Jared C. Cox, DO and Kimberly D. Haycock, PA and Darrell L. Wilson, MD, by and through their respective counsel, herby submit this memorandum in opposition to Plaintiff's Motions in Limine Nos. 1; 6; 8; 9; 10; 11; 12; and, 14. This memorandum also notes

full or partial stipulations to Plaintiff's Motions in Limine numbers 2; 3; 4; 5; 7; 13; 15; 16; 17; 18; 19; and, 20. The stipulations were reached as the result of a meeting with Plaintiff's counsel and Defense counsel.

OPPOSITION TO PLAINTIFF'S MOTION IN LIMINE NO. 1

Preferred Disposition and Grounds Therefor

For the reasons set forth below, if the Court denies Defendants Motion in Limine No. 13, Defendants request that Plaintiff's Motion in Limine No. 1 be denied as well. (Pls.' Motions in Limine 1-20, MIL 1, pp. 1-2, See Electronic Docket Record ("EDR) 264; Defs.' Motions in Limine 1-18, EDR 266).

Argument

Should the Court deny Defendants' Motion in Limine No. 13, Plaintiff's Motion in Limine No. 1 likewise should be denied. Defendants' No. 13 seeks to preclude Plaintiff from making "reptile," "golden rule," or "safety" arguments to the jury suggesting a defense verdict could risk their safety. (EDR 266, MIL 13, pp. 10-17). If Plaintiffs are allowed to suggest that defense verdicts somehow risk the safety the jurors and all patients in general, Defendants should be permitted to rebut that by suggesting that large damage awards in medical malpractice cases, which put doctors out of business or dissuade people from entering the medical profession in the first place, risk the safety of all patients.

Conclusion

If the Court grants Defendants' Motion in Limine No. 13, they agree that the types of statements referenced in Plaintiff's Motion in Limine No. 1 would not be appropriate. However, if Defendants' No. 13 is denied and Plaintiff is allowed to make reptile, golden rule, or safety arguments, Plaintiffs' Motion in Limine No. 1 likewise should be denied.

STIPULATION REGARDING PLAINTIFF'S MOTION IN LIMINE NO. 2

Defendants stipulate to Plaintiff's Motion in Limine No. 2, regarding suggestions that this case is frivolous, or referencing "frivolous lawsuits" in general. (EDR 264, MIL 2, p. 2).

STIPULATION REGARDING PLAINTIFF'S MOTION IN LIMINE NO. 3

Defendants generally stipulate to Plaintiff's Motion in Limine No. 3 regarding statements or arguments bolstering Defendants' character or reputation. (EDR 264, MIL 3, pp. 2-3). However, should Plaintiff call into question the Defendants' reputations, the parties have stipulated that Defendants will then be able to rebut such questioning.

STIPULATION REGARDING PLAINTIFF'S MOTION IN LIMINE NO. 4

Defendants stipulate to Plaintiff's Motion in Limine No. 4 regarding other legal actions involving the parties, in exchange for Plaintiff's stipulation to Defendants' Motion in Limine No. 4 regarding other lawsuits against Defendants. (EDR 264, MIL 4, p. 3; EDR 266, MIL 4, pp. 5-6).

STIPULATION REGARDING PLAINTIFF'S MOTION IN LIMINE NO. 5

Defendants stipulate to Plaintiff's Motion in Limine No. 5 regarding Defendants' charitable work or volunteer service, in exchange for Plaintiff's stipulation to Defendants' Motion in Limine No. 14 regarding Plaintiff's charitable work, church work, church activity or volunteer service. (EDR 264, MIL 5, p. 3; EDR 266, MIL 14, p. 17).

OPPOSITION TO PLAINTIFF'S MOTION IN LIMINE NO. 6

Preferred Disposition and Grounds Therefor

The Court should deny Plaintiff's Motion in Limine No. 6 and allow the Defendants to testify regarding their experience caring for patients with similar concerns.

Argument

In his Motion in Limine No. 6, Plaintiff improperly requests that this Court prohibit the Defendants from testifying regarding their experience "provid[ing] similar treatment in the past without complication…" (EDR 264, MIL 6, pp. 3-4). This request should be denied, because this type of testimony is both relevant and admissible.

It is relevant because a physician's experience treating similarly patients is a critical part of their medical decision-making process. "Experience" can be a powerful teacher, particularly in the medical field. The *Practice of Medicine* is an evolving science largely dependent on the clinical response of patients to varying treatments.

In this case, the Defendants must be allowed to share with the jury their medical decision-making process. This necessarily includes a general description of their experience treating other patients who have suffered similar injuries, the treatment provided, and the patients' response. If this medical "experience" is excluded, the Court may as well prohibit the Defendants from discussion their education and training --- which in conjunction with "experience" are the primary factors which influence a medical provider's exercise of professional judgment. All three are important. All three must be discussed and considered.

In an effort to cite some "authority" for his request, Plaintiff *hitch-hikes* his argument on Utah R. Evid. 404(b) "Crimes Wrongs and Other Acts" (EDR 264, MIL p. 4). However, Rule404(b) is inapposite to the present issue. URE Rule 404(b) is applied primarily in "criminal" proceedings. Specifically, there are only two subsections in Rule 404(b). Subsection (b)(2) is captioned *"Permitted Uses; Notice in a Criminal Case"* and is <u>not</u> applicable as it outlines what the "prosecutor" must do. As such, Subsection (b)(2) clearly does not apply.

The remaining portion of Rule 404(b), Subsection (1) reads, *"Evidence of a crime, wrong, or other act 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."* The application of this Rule is simple, for example, because "Defendant A" pointed a gun a store clerk *on an occasion prior*, does not necessarily mean his "character" is such that he would do it *again.* This type of issue and application of Rule 404(b) is not before the Court, and as such, there is no authority for the Plaintiff's request.

The application, or rather *mis*application, of URE Rule 404(b) to the facts of this case is abundantly obvious. The Defendant physicians "experience with other patients" is not inadmissible "character" evidence as commonly understood and applied in the context of Rule 404(b).

Conclusion

The Plaintiffs' request to exclude the Defendants' "experience" with other patients as part of the medical decision-making process has no basis or application Rule 404(b), and as outlined above should be denied.

STIPULATION REGARDING PLAINTIFF'S MOTION IN LIMINE NO. 7

Defendants stipulate to Plaintiff's Motion in Limine No. 7 regarding testimony of experts that they spoke with colleagues or other physicians who agree with their opinions. (EDR 264, MIL 7, pp. 4-5).

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OPPOSITION TO PLAINTIFF'S MOTION IN LIMINE NO. 8

Preferred Disposition and Grounds Therefor

Defendants request that Plaintiff's Motion in Limine No. 8 be denied. This motion, seeking preclude expert testimony from individuals other than properly designated experts is unsupported by any specific facts or arguments. (EDR 264, MIL 8, pp. 5-6).

Argument

Plaintiff argues that Defendants should be precluded from eliciting expert testimony from any individual not properly designated as an expert. However, Plaintiff only refers generally to "treating" providers. He does not say what treating providers, if any, Defendants failed to properly designate as experts and argue why the designations of any such treating providers were deficient. Defendants cannot defend the sufficiency of any specific designation when Plaintiff has failed to inform them of what, if anything, is deficient about their disclosures.

Conclusion

Plaintiff's Motion in Limine No. 8 should be denied. Plaintiff has failed to articulate any alleged deficiency in Defendants' expert designations and should not be permitted to do so for the first time in a future reply brief.

OPPOSITION TO PLAINTIFF'S MOTION IN LIMINE NO. 9

Preferred Disposition and Grounds Therefor

Defendants request that Plaintiff's Motion in Limine No. 9 be denied. Plaintiffs' Motion seeks to preclude factual testimony from witnesses not properly identified. (EDER 264, MIL 9, p. 6). As with Plaintiff's No. 8, No. 9 is unsupported by any specific facts or arguments.

Argument

Plaintiffs argue that Defendants should be precluded from eliciting factual testimony from any individual not properly designated as a fact witness. However, they do not specify any witnesses who they allege Defendants have not properly identified as fact witnesses. Again, Defendants cannot defend the sufficiency of any specific witness disclosure when Plaintiff has failed to inform them of what, if anything, is deficient about their disclosures.

Conclusion

Plaintiff's Motion in Limine No. 9 should be denied. Plaintiff has failed to articulate any alleged deficiency in Defendants' disclosures of fact witnesses and should not be permitted to do so for the first time in a future reply brief.

OPPOSITION TO PLAINTIFF'S MOTION IN LIMINE NO. 10

Preferred Disposition and Grounds Therefor

Plaintiff's Motion in Limine No. 10 should be denied in part. Plaintiffs' Motion seeks to preclude Defendants from referencing collateral source payments at trial. (EDR 264, MIL 10, pp. 6-7). Defendants concede that it would be improper to reference *past* collateral sources at trial, but it is appropriate for the jury to consider *future* available benefits.

Argument

Plaintiff's argument with regard to collateral sources does not differentiate between past collateral sources and benefits that may be available to cover future expenses. Plaintiff correctly points out that it would be improper for Defendants to reference insurance payments made for past medical expenses. This is for the Court to consider for the purpose of reducing the jury's verdict, if any, after trial. (Utah Code Ann. § 78B-3-405(1)-(3); See also EDR 266, MIL 1, pp. 2-

3). Defendants also agree that it would be improper for them to question Plaintiff about amounts he has paid out of pocket for medical expenses.

However, benefits that may be available in the future are proper to reference at trial and in fact, such evidence is admissible for the jury's consideration in determining a damage award, if any, for future expenses. On this point, the same statute that takes past collateral sources out of the jury's hands, contains a provision stating the future available benefits are admissible. The relevant provision states,

> Evidence is admissible of government programs that provide payments or benefits available in the future to or for the benefit of the plaintiff to the extent available irrespective of the recipient's ability to pay. Evidence of the likelihood or unlikelihood that the programs, payments, or benefits will be available in the future is also admissible. The trier of fact may consider the evidence in determining the amount of damages awarded to a plaintiff for future expenses.

UCA § 78B-3-405(5). Thus, evidence of future benefits is appropriate for the jury's consideration.

Conclusion

Plaintiff's Motion in Limine No. 10 should be denied in part. While Defendants acknowledge that reference to past collateral sources at trial would be inappropriate, evidence of future benefits is admissible.

OPPOSITION TO PLAINTIFF'S MOTION IN LIMINE NO. 11

Preferred Disposition and Grounds Therefor

Defendants' oppose in-part, and stipulate in-part, to Plaintiff's Motion in Limine No. 11. The Plaintiff is requesting the Defendants not be allowed to elicit standard of care opinions from treating providers. Defendants stipulate so long as the limitation is reciprocal. Defendants agree not to ask treating providers questions like, "Does it appear to you that the Defendants did

everything they could for the Plaintiff?", so long as Plaintiff does not ask any of the treating providers questions like, "Does it appear the Defendants could have done more for the Plaintiff?"

Argument

Plaintiff's argument is well-taken, that standard of care opinions should not be elicited from treating providers. Defendants agree. However, Plaintiff misapplies this argument in two of the four examples he provides in his Motion. (EDR 264, MIL 11). Defendants agree that two of the examples provided by the Plaintiff are improper questions that impliedly comment on the standard of care, to wit:

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

"Did you see anything that suggests substandard care?"

(EDR 264, MIL 11, p. 7). Defendants stipulate and agree not to ask this type of question that elicits standard of care opinions regarding this specific case.[1]

However, the two additional examples provided by the Plaintiff are not improper. They do not impliedly comment on the standard of care in this specific case, but rather are general principles of medicine containing "specialized knowledge" that the lay juror likely would not know or understand. These two examples do <u>not</u> reference the Defendants, or the care they provided in this case, to wit:

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

"An injury can occur even when the physician/nurse does everything appropriately, can't it?" (EDR 264, MIL 10, p. 7). These two examples contained in Plaintiff's Motion in Limine, No. 11, are <u>not</u> standard of care opinions. Nor do these examples imply one way or the

[1] This stipulation is contingent upon the Plaintiff similarly agreeing not to ask improper standard of care questions such as, "Does it appear to you that the Defendants could have provided more or better care to the Plaintiff?"

other whether the Defendants satisfied the standard of care. Rather, these two examples fall within the scope of general medical expertise and "specialized knowledge" that is not commonly known or well-understood by the lay juror. The Advisory Committee Notes ("Advisory Notes") to Rule 26 of the Utah Rules of Civil Procedure touches on this point. The Advisory Notes state in relevant part,

> *There are a number of difficulties inherent in disclosing expert testimony that may be offered from fact witnesses. First, there is often not a clear line between fact and expert testimony. Many fact witnesses have scientific, technical or other specialized knowledge, and their testimony about the events in question often will cross into the are of expert testimony. These rules are not intended to erect artificial barriers to the admissibility of such testimony.*

See, Advisory Notes, Utah R. Civ. Proc., Rule 26.

These two examples, and questions like it, help the lay juror understand that just because someone was injured, or became ill, does not mean there was medical malpractice or negligence. These two examples educate the jury who may be under the false assumption that because the Plaintiff suffered an injury, someone must be at fault. This of course is false and should be addressed in the questioning of the witnesses.

Conclusion

For the reasons outlined above, this Court should accept the stipulation and limit any questions that comment directly on the care provided by the Defendants. Also, the Court should allow the Defendants to ask treating providers questions that involve "specialized knowledge" and medical principles that will educate the jury, without commenting directly on the Defendants' care.

OPPOSITION TO PLAINTIFF'S MOTION IN LIMINE NO. 12

Preferred Disposition and Grounds Therefor

Defendants request that Plaintiff's Motion in Limine No. 12 be denied. This motion, seeks to preclude Defendants from presenting any evidence that any non-party medical provider provided substandard medical care and treatment, thereby causing, or contributing to the Plaintiff's alleged injury. (EDR 264, MIL 12, pp. 8-9).

Argument

Plaintiff argues that Defendants should be precluded from presenting any evidence that a non-party medical provider provided substandard medical care and treatment, thereby causing, or contributing to the Plaintiff's alleged injury. However, Plaintiff only refers generally to "statements or testimony" that is critical of a "non-party medical provider". He does not say which, if any, statement or testimony regarding a non-party medical provider is improper or objectionable. Defendants cannot defend the sufficiency of any specific testimony when Plaintiff has failed to inform them of what, if any, testimony he is referring to.

However, Defendants will agree that the witnesses they intend to call at trial, who have been deposed, will testify consistent with their medical records and depositions. It is reasonable to expect, if Plaintiff had any objection to any deposition testimony that has already been provided in this case, he would have identified the portions of the depositions for the parties and Court in their Motion. This has not been done, and therefore this court should allow the witnesses to testify consistent with their depositions.

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Conclusion

Plaintiff's Motion in Limine No.12 should be denied. Plaintiff has failed to articulate any specific testimony from any witness regarding a non-party medical provider that is objectionable. Defendants agree to have their trial witnesses testify consistent with their depositions.

STIPULATION REGARDING PLAINTIFF'S MOTION IN LIMINE NO. 13

Defendants stipulate to Plaintiff's Motion in Limine No. 13 seeking to limit defense experts to the testimony offered in deposition, in exchange for Plaintiff's stipulation to Defendants' Motion in Limine No. 11, seeking to exclude undisclosed opinions and testimony from Plaintiff's experts. (EEDR 264, MIL 13, pp. 9-11; EDR 266, MIL 11, p. 9). However, should either party ask questions that would require an expert to go outside his/her deposition or report, the parties stipulate that opposing counsel will be permitted to ask questions in rebuttal or redirect in response to the questioning that exceeded the scope.

OPPOSITION TO PLAINTIFF'S MOTION IN LIMINE NO. 14

Preferred Disposition and Grounds Therefor

Defendants oppose Plaintiff's Motion in Limine No. 14. In this motion, Plaintiff argues that speculative testimony regarding why someone did or did not do or say something, should be precluded. (EDR 264, MIL 14, p. 11). However, Plaintiff provides no specific facts or argument.

Argument

In general, Defendants do not disagree that speculative testimony is improper. However, Plaintiff's argument is vague as to what he considers speculative. Many witnesses may not recall precisely what they were told, or why something was done, but the witnesses have some recollection and/or can give an estimation. To the extent Plaintiff is arguing that witnesses who

lack a perfect memory cannot give an estimation, or paraphrase what they recall doing, saying, or being told, Motion in Limine No. 14 should be denied.

Conclusion

Plaintiff's Motion in Limine No. 14 should be denied. Although speculative testimony in general is improper, witnesses should be allowed to provide estimations, or give their best memory if they do not have perfect recall.

STIPULATION REGARDING PLAINTIFF'S MOTION IN LIMINE NO. 15

Defendants stipulate to Plaintiff's Motion in Limine No. 15 regarding references to a criminal burden of proof or related language applicable to criminal law. (EDR 264, MIL 15, p. 11).

STIPULATION REGARDING PLAINTIFF'S MOTION IN LIMINE NO. 16

Defendants stipulate to Plaintiff's Motion in Limine No. 16 regarding the inflammatory statements set forth in that motion. (EDR 264, MIL 16, pp. 11-12).

STIPULATION REGARDING PLAINTIFF'S MOTION IN LIMINE NO. 17

Defendants stipulate to Plaintiff's Motion in Limine No. 17, seeking to preclude reference to previously named parties. (EDR 264, MIL 17, p. 12). Plaintiff initially named Valley View Medical Center/IHC (now Cedar City Hospital) and an emergency physician, who have since been dismissed. Defendants are not seeking to allocate fault to these previous parties, and given Plaintiff's acknowledgment that identifying these witnesses as prior parties would be proper for purposes of impeachment, if that becomes necessary, Defendants will stipulate.

STIPULATION REGARDING PLAINTIFF'S MOTION IN LIMINE NO. 18

Defendants stipulate to Plaintiff's Motion in Limine No. 18 regarding a standard of care specific to Cedar City, Utah. (EDR 264, MIL 18, pp. 12-13).

STIPULATION REGARDING PLAINTIFF'S MOTION IN LIMINE NO. 19

Defendants stipulate to Plaintiff's Motion in Limine No. 19 regarding Defendant's expert Brad Ward, MD ("Dr. Ward") being limited to causation opinions. (EDR 264, MIL 19, p. 13). However, if Plaintiff opens the door by asking Dr. Ward to directly or impliedly offer standard of care opinions, the parties have stipulated that Defendants will be permitted to ask questions in rebuttal in response to such direct or implied standard of care questions.

STIPULATION REGARDING PLAINTIFF'S MOTION IN LIMINE NO. 20

Defendants stipulate to Plaintiff's Motion in Limine number 20 regarding expert Amy Powell, MD. (EDR 264, MIL 20, pp. 13-14).

DATED this 31st day of July, 2023.

KIPP & CHRISTIAN, PC

/s/ Nan T. Bassett
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DATED this 31st day of July, 2023.

CAMPBELL WILLIAMS FERENCE & HALL

/s/ Vaun B. Hall
VAUN B. HALL
CAMERON BEECH
Attorney for Defendant Darrell L. Wilson, MD

CERTIFICATE OF SERVICE

On this 31st day of July, 2023 I caused a true and correct copy of the foregoing **DEFENDANTS' MEMORANDUM IN OPPOSITION TO CERTAIN MOTIONS IN LIMINE and STIPULATIONS TO CERTAIN MOTIONS IN LIMINE** to be electronically filed through the Utah State Court and served upon the following:

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