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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.; DOE INDIVIDUALS 1 through 10; and ROE ENTITIES 1 through 10, inclusive. Defendants.	**OPPOSITIONS AND RESPONSES TO DEFENDANTS' JOINT MOTIONS IN LIMINE 1-18** Case No. 170500085 Judge JEFFREY C. WILCOX Tier 3

Plaintiff hereby submits his Responses to Defendants' ("Defendants") Joint Motions in Limine 1-18.

1. OPPOSITION TO DEFENDANTS' MOTION IN LIMINE NO. 1: COLLATERAL SOURCES.

Plaintiff opposes Defendants' Motion in Limine No. 1 seeking an order from the court to reduce Plaintiffs damages for economic losses by the amount of collateral sources available to Plaintiff. This request is inappropriate as a motion in limine and is premature. UCA 78B-3-405 states that evidence of collateral sources can be presented only after a "finding of liability and an

awarding of damages by the trier of fact." UCA § 78B-3-405(2). As such, the court should defer any decision on this issue until after trial should Plaintiff be granted an award. Furthermore, determination of collateral sources requires that the court "receive evidence concerning the total amounts of collateral sources which have been paid to or for the benefit of the plaintiff are otherwise available to him." *Id.* The court cannot grant Defendants' Motion in Limine as it is an inappropriate motion in limine and is premature. Should Plaintiff be successful at trial with an award from the jury, Defendants can then file a motion to reduce damages for collateral sources.

2. RESPONSE TO DEFENDANTS' MOTION IN LIMINE NO. 2: INSURANCE POLICIES OR INSURANCE COVERAGE.

Plaintiff agrees to Defendants' Motion in Limine No. 2. Plaintiff requests that the same restriction apply to all parties. No party should be permitted to introduce evidence or testimony regarding the existence of any potential insurance coverage including, but not limited to, liability or health insurance coverage.

3. RESPONSE TO DEFENDANTS' MOTION IN LIMINE NO. 3 SETTLEMENT DISCUSSIONS.

Plaintiff agrees to Defendants' Motion in Limine No. 3. Plaintiff requests that the same restrictions apply to all parties. No party should be permitted to introduce evidence or argument regarding any settlement discussions that may have taken place between or among the parties.

4. RESPONSE TO DEFENDANTS' MOTION IN LIMINE NO. 4: OTHER LAWSUITS AGAINST DEFENDANTS.

Plaintiff agrees to Defendants' Motion in Limine No. 4 with Defendants stipulation to Plaintiff's Motion in Limine No. 4. Plaintiff requests that the same restrictions apply to all parties. No party should be permitted to introduce evidence or argument regarding any other legal actions involving any party in the case.

5. RESPONSE TO DEFENDANTS' MOTION IN LIMINE NO. 5:

CHARACTERIZATION OF DEFENDANTS' RETAINED ATTORNEYS, LAW FIRMS, AND THEIR PRACTICES

Plaintiff agrees to Defendants' Motion in Limine No. 5. Plaintiff requests that the same restrictions apply to all parties. No party should be permitted to introduce evidence or argument characterizing the other party's attorneys, law firms, or their practices.

6. RESPONSE TO DEFENDANTS' MOTION IN LIMINE NO. 6: EFFORTS TO EXCLUDE OR LIMIT EVIDENCE

Plaintiff agrees to Defendants' Motion in Limine No. 6. Plaintiff requests that the same restrictions apply to all parties. No party should be permitted to introduce evidence or argue to bring more evidence to the attention of the jury but, by Court order, are not allowed to do so.

7. RESPONSE TO DEFENDANTS' MOTION IN LIMINE NO. 7: REQUESTS FOR STIPULATION IN FRONT OF THE JURY

Plaintiff agrees to Defendants' Motion in Limine No. 7. Plaintiff requests that the same restrictions apply to all parties. No party should be permitted to request another party to stipulate to the admissibility of any evidence or stipulate any factual or legal issue in front of the jury.

8. RESPONSE TO DEFENDANTS' MOTION IN LIMINE NO. 8: SEQUENCE OF TESTIFYING WITNESSES

This request is not proper for a motion in limine. *Kelly v. New W. Fed. Sav.*, 49 Cal. App. 4th 659, 671 (1996) ("Matters of day-to-day trial logistics and common professional courtesy should not be the subject of motions *in limine*."). Scheduling is an ongoing / fluid issue. Plaintiff will do the best to keep Defendants apprised of what witnesses will be called and when. At a minimum, Plaintiff will do the best to give Defendants 24-48 hours advanced notice before calling a witness.

9. OPPOSITION TO DEFENDANTS' MOTION IN LIMINE NO. 9: BAR NON-PARTY WITNESSES FROM THE HEARING

Plaintiff opposes Defendants' Motion in Limine No. 9 seeking to exclude Plaintiff's non-

party witnesses from the trial. Defendants request is an inappropriate motion in limine and is overly broad. This is a public trial and the Plaintiff's family, and friends should be allowed to be in the courtroom to observe the proceedings and offer support to the Plaintiff. To the extent that Defendants seek only to sequester expert witnesses, then Plaintiff has no objection and is willing to stipulate so long as the same restrictions apply to all parties. The court should exclude non-party expert witnesses from the trial, except when called to provide testimony unless that witness's presence at trial is essential to a claim or defense.

10. OPPOSITION TO DEFENDANTS' MOTION IN LIMINE NO. 10: REFERENCE TO WITNESSES NOT CALLED AT TRIAL

Plaintiff opposes Defendants' Motion in Limine No. 10 seeking to exclude any testimony, reference, or argument regarding witnesses not called at trial. Notably, Defendants do not provide any basis or explanation for such testimony, reference, or argument to be excluded. It is perfectly acceptable for a party to point out the absence of a witness that could have been called to trial by another party but was not to the jury. There is nothing unduly prejudicial about such testimony, reference, or argument and is commonplace.

11. RESPONSE TO DEFENDANTS MOTION IN LIMINE NO. 11: EXCLUDE UNDISCLOSED OPINIONS AND TESTIMONY FROM PLAINTIFF' EXPERT WITNESSES

Plaintiff agrees to Defendants' Motion in Limine No. 11 with Defendants stipulation to Plaintiff's Motion in Limine No. 13. Plaintiff requests that the same restrictions apply to all parties. No party should be permitted to offer any testimony, opinion, or subject matter not disclosed in the expert witness's written report, or, if a deposition has been taken, in the deposition of the expert witness.

12. OPPOSITION TO DEFENDANTS' MOTION IN LIMINE NO. 12: PRECLUDE LAY WITNESSES FROM OFFERING EXPERT TESTIMONY

Plaintiff opposes Defendants' Motion in Limine No. 12 seeking to preclude lay witnesses from offering expert testimony. Defendants' request is overly broad and would unfairly preclude lay witnesses from providing testimony about matters that are within their lay observations. Specifically, Defendants seek to preclude lay witnesses from providing testimony about "Mr. Hinson's health, life expectancy, and physical capabilities." While Plaintiff agrees lay witnesses should be precluded from providing expert testimony or opinion testimony that requires the necessary scientific, technical, or other specialized knowledge and foundation to provide, Defendants request goes too far. Should the court grant Defendants' Motion in Limine No. 12, Plaintiff's family and friends would not be allowed to provide relevant and appropriate testimony about how Mr. Hinson appears to them, whether he is active, whether he can play with his kids, how his injuries have affected him, and other topics that do not require specialized and scientific knowledge and only require a laypersons observation. Plaintiff should be allowed to present testimony from lay witnesses about their lay observations. As such, the court should deny Defendants' Motion in Limine No. 12. At most, the court should address objections about expert testimony as the evidence comes in live at trial.

13. OPPOSITION TO DEFENDANTS MOTION IN LIMINE NO. 13: PRECLUDE "REPTILE THEORY" "GOLDEN RULE" AND "SAFETY" ARGUMENTS

INTRODUCTION

Defendants seek an order from the Court precluding Plaintiff from making any so-called "Reptilian" or "Golden Rule" arguments at trial. Defendants argue that any mention comment, reference, testimony, or argument regarding personal safety, community safety, or public safety rules should be precluded because they are reptilian or akin to Golden Rule arguments.
The Court should deny Defendants' Motion to the extent that it is unsupported by applicable law and would improperly limit Plaintiff's ability to present his case. Utah's prohibition on reptilian

or "golden rule" arguments only prohibits the use of golden rule arguments as to damages. Plaintiff agrees that such arguments are inappropriate and will not ask the members of the jury to place themselves in Plaintiff's shoes when determining damages. However, any further limitation would be inappropriate.

ARGUMENT

I. The Motion Should Be Denied to The Extent It Goes Beyond "Golden Rule" Arguments.

Plaintiff agrees that inflaming the passions of the jury is inappropriate and hereby agrees not to make such arguments. However, Defendants' Motion goes beyond these arguments and seeks to impermissibly limit Plaintiff and his counsel from presenting the case.

Defendants argue that Plaintiff should not be allowed to use so called "Reptilian" arguments.[1] Defendants argue that reminding the Jury to consider the safety standards of the community is improper. To the extent such arguments are not made toward damages, it should be denied. However, even analyzed alone, Defendants' Motion seeks to impermissibly limit Plaintiff's ability to properly present evidence and argument.

Defendants argue that "Reptilian" arguments improperly ask the Jury to consider the safety of the community in which the juror lives. The Utah Supreme Court has recognized that the jury's role is to serve as the conscience of the community,[2] and it has recognized the

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[1] Similar motions titling their arguments as anti- "Reptile" have been denied in several jurisdictions. *Winebarger v. Boston Sci. Corp.*, No. 3:15CV211-RLV, 2015 WL 5567578, at *10 (W.D.N.C. Sept. 22, 2015) (denying party's "Motion to Preclude 'Reptile' Litigation Tactics"); *Hensley v. Methodist Healthcare Hosps.*, No. 13-2436-STA-CGC, 2015 WL 5076982, at *4 (W.D. Tenn. Aug. 27, 2015) (denying motion in limine to prohibit arguments based on "the 'Reptile Theory'"); *Upton v. N.W. Ark. Hosp., LLC*, Circuit Court of Washington County, Arkansas, Case No 2010-270-4 (denying "Motion in Limine to Exclude the 'Reptile'") (attached as Exhibit A).

[2] *E.g., State v. Young*, 853 P.2d 327, 382 (Utah 1993) ("We expect sentencing juries to express the 'conscience of the community'"), quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 n. 15 (1968); *State v. Pierren*, 583 P.2d 69, 71 (Utah 1978) (affirming as appropriate a jury instruction that the jury was "the common conscience of the community"). *See also United States v. Solivan,* 937 F.2d 1146, 1151 (6th Cir. 1991) ("Unless calculated to incite the passions and prejudices of the jurors, appeals to the jury to act as the community conscience are not per se

propriety of allowing the jury—here, the Jury— to place itself in the shoes of a party—here, the Defendants—to determine the reasonableness of the party's conduct in light of the applicable standard of care.[3] Reminding the members of the Jury of their proper role and asking them to think about the consequences of their decision in enforcing the community standard of care is not asking them to place themselves in the Plaintiff's shoes and award damages for injury to someone else.[4] Rather, it is reminding the members of the Jury of the community standards and their role in enforcing them has repeatedly been found to be proper.[5] Courts nearly universally support and instruct juries that they are indeed supposed to enforce the standards of the community.[6]

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impermissible.") (citation omitted); *United States v. Kopituk,* 690 F.2d 1289, 1342-43 (11th Cir. 1982) (accord); *United States v. Lewis,* 547 F.2d 1030, 1036 (8th Cir. 1976) (accord); *People v. Harlan,* 8 P.3d 448, 508 (Colo. 2000) ("It is not error for a prosecutor . . . to refer to the jurors as the 'conscience of the community.'") (citation omitted), *overruled on other grounds by People v. Miller,* 113 P.3d 743 (Colo. 2005); *United States v. Spock,* 416 F.2d 165, 182 (1st Cir. 1969) (accord); *Simpson v. Anderson,* 517 P.2d 416, 418 (Colo. Ct. App. 1973) ("jurors collectively represent a cross-section of the conscience of the community"), *rev'd on other grounds,* 526 P.2d 298 (Colo. 1974).

[3] *Green*, 29 P.3d at 648 (finding proper comments by a defense lawyer asking the jury to put themselves in the Respondent's shoes and consider the propriety of his actions was appropriate and did not violate the proscription on golden rule arguments).

[4] *See*, e.g., State v. Daniels, 737 S.E.2d 473, 475 (S.C. 2012) ("A charge that the jury is acting for the community . . . is not similar to a Golden Rule argument in that it does not ask the jury to consider the victim's perspective").

[5] *See Lockhart v. McCree*, 476 U.S. 162, 182 (1986) (explaining that "a jury [] must . . . do little more-and must do nothing less-than express the conscience of the community" where individual convicted of felony murder had filed post-conviction habeas corpus petition) *Puertas v. Overton*, 168 F. App'x 689, 701 (6th Cir. 2006) (explaining "[u]nless calculated to incite the passions and prejudices of the jurors, appeals to the jury to act as the community conscience are not per se impermissible") (brackets in original); *Wicks v. Wal–Mart Stores, Inc.,* 199 F.3d 1324, 1324 (2d Cir.1999) (rejecting argument that counsel's suggestion in closing arguments that a jury should act as the "conscience of the community" was improper); *Freeman v. Blue Ridge Paper Products, Inc.*, 229 S.W.3d 694, 712 (Tenn. Ct. App. 2007) (stating "An appeal to the jury to act as the community's conscience is not necessarily improper argument" and holding no abuse of discretion occurred where, in closing, "plaintiff's counsel told the jury that he wished he could have brought the lawsuit on behalf of the entire county and that it was up to the jury to act as 'the conscience of the community.'"); *Florida Crushed Stone Co. v. Johnson*, 546 So. 2d 1102, 1104 (Fla. Dist. Ct. App. 1989) (stating that comments by plaintiffs' counsel in closing argument that "the jury was the conscience of the community and must 'send a message forward about this family'" did not constitute grounds for reversible error); *Simpson v. Anderson*, 517 P.2d 416, 418 (Colo. App. 1973), (stating "jurors collectively represent a cross-section of the conscience of the community") *rev'd as to unrelated grounds*, 526 P.2d 298 (Colo. 1974).

[6] *See* 22 state survey of judicial commentaries regarding the role of community standards in a jury's determinations, attached as Exhibit B.

Safety is the sum and substance of a personal injury case such as this. Such an action "inevitably involves balancing individual and social interests."[7] Indeed, one of the traditional roles of tort law has been to expose and remedy threats to the public welfare.[8] As Deans Prosser and Keeton recognized long ago:

> The 'prophylactic' factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. When the decisions of the courts become known, and Defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm. Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive.[9]

Defendants' Motion seeks to prohibit Plaintiff from presenting permissible, persuasive arguments. Plaintiff's counsel should be allowed to do what it is supposed to: zealously advocate on behalf of his clients.

> Counsel is not required to make such a lukewarm and sterile argument that the jury is unable to determine which side of the case he is on, and likewise counsel must be indulged the privilege of flights of oratory. The final argument is designed to be persuasive, and so long as it is based upon the facts and issues raised by the evidence and not so inflammatory as to influence the jury to render an improper verdict, the argument is not intrinsically improper.[10]

Moreover, even if there was a conceivable argument that referencing community standards *may* persuade the Jury to decide this case on an improper basis, "[t]he mere fact that evidence possess a tendency to suggest a decision upon an improper basis does not require exclusion; evidence may be excluded only if the danger of unfair prejudice *substantially outweighs* the probative value of the proffered evidence."[11] Arguing to the jury that it should

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[7] *See* Thomas H. Koenig & Michael L. Rustad, In Defense of Tort Law 1 (2001).
[8] Id.
[9] W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 4, at 25 (5th ed. 1984); William L. Prosser, Handbook on the Law of Torts 23 (3d ed. 1964).
[10] *Rainbow Express, Inc. v. Unkenholz*, 780 S.W.2d 427, 434 (Tex. Ct. App. 1989).
[11] *State v. Maurer*, 770 P.2d 981, 984 (Utah 1989). (emphasis in original).

enforce the community standard for the standard of care is also not enflaming the passions of the jury.

Defendants similarly argue that golden rule arguments should be prohibited. A golden rule argument is an argument where the lawyer asks the jurors to reach a verdict by placing themselves in the Plaintiff's shoes.[12] However, as the Utah Supreme Court found in *Green*, golden rule arguments are only improper when asking the jury to determine damages.[13] Golden rule arguments to other issues, such as liability and community safety, are permissible under Utah law. Utah courts have long recognized that counsel presenting arguments are free to use arguments based on logical inferences from the evidence presented at trial.[14]

Defendants cite non-binding district court cases and argue that because medical malpractice cases require the standard of care to be established by experts, Plaintiff should not be able to ask the Jury to consider a community standard for liability. However, Plaintiff is not suggesting that he will present evidence or argument to the jury that is not supported by experts. Defendants' motions are too broad and seek to limit the arguments Plaintiff's counsel can make to a jury. The truth is, it is the Jury's responsibility to hold these defendant doctors accountable to the community standard or the standard of care, as established by expert testimony.

II. At A Minimum, Plaintiff Should Be Permitted to Discuss Safety Issues as They Relate to The Standard of Care.

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[12] *See Green v. Louder*, 29 P.3d 638, n. 13 (Utah 2001).
[13] Id. at ¶ 36.
[14] *See State v. Wright*, 304 P.3d 887, 901 (Utah Ct. App. 2013) ("Generally speaking, in argument to the jury, counsel for each side has considerable latitude and may discuss fully from their viewpoints the evidence and the inferences and deductions arising therefrom") *quoting State v. Tillman*, 750 P.2d 546, 560 (Utah 1987); *State v. Lafferty,* 20 P.3d 342 (Utah 2001) (an attorney "has the right to draw inferences and use the information brought out at trial in his closing argument") (citations omitted). *See also State v. Larsen,* 113 P.3d 998, 1001-02 (Utah Ct. App. 2005) (observing that prosecutor's comments "relie[d] only on evidence presented at trial and appeal[ed] to the jury to make a common sense inference based on the evidence").

A blanket prohibition of any argument or evidence regarding "personal safety, community safety or public safety" would prevent Plaintiff from introducing necessary and permissible evidence. By their motion, Defendants seek an overly broad preclusion of any argument or evidence regarding community standards or safety, which would preclude the introduction of permissible and necessary evidence. Plaintiff should not be limited in his ability to present evidence and argument regarding the applicable standard of care, such as referring to precautions that are required by the standard of care to protect patients from sustaining further injury or wrongful death at the hands of a healthcare provider. Plaintiff should not be hindered in presenting his case as to what was the standard of care.

By their broad strokes, Defendants seek to preclude the very evidence that is necessary to prove a negligence / medical malpractice claim. To prove a medical malpractice claim, Plaintiff must show that Defendants' care and treatment fell below the applicable standard of care, causing harm to the Plaintiff and that justice requires the Plaintiff be made whole. Failure to comply with the standard of care or applicable safety rules / community standards is what Plaintiff is required to show. Additionally, Defendants' request to preclude any arguments or evidence regarding safety rules or community standards is overly broad, vague and would preclude necessary foundational evidence. Plaintiff should be permitted to lay foundation for his experts' opinions. To that end, Plaintiff should be permitted to show why the standard of care is what it is. This would include showing how certain care and treatment would have prevented Plaintiff's injury and why certain care and treatment is safe or unsafe.

14. RESPONSE TO DEFENDANTS MOTION IN LIMINE NO. 14: PRECLUDE ANY REFERENCE TO PLAINTIFF'S CHARITABLE WORK, CHURCH WORK, CHURCH ACTIVITY OR VOLUNTEER SERVICE.

Plaintiff agrees to Defendants' Motion in Limine No. 14 with Defendants stipulation to

Plaintiff's Motion in Limine No. 5. Plaintiff requests that the same restrictions apply to all parties. No party should be permitted to comment or reference their charitable work, church membership, or volunteer service.

15. RESPONSE TO DEFENDANTS MOTION IN LIMINE NO. 15: NO REFERENCE TO, OR SHOW TO THE JURY OF, ANY PROPOSED EXHIBIT, UNLESS THE SAME EXHIBITS HAVE PREVIOUSLY BEEN SHOWN TO DEFENSE COUNSEL TO ASSESS ITS RELEVANCY AND WHETHER TO OBJECT TO ADMISSIBILITY

Plaintiff agrees to Defendants' Motion in Limine No. 15. Plaintiff requests that the same restrictions apply to all parties. No party should be permitted to introduce any exhibit to the jury or to a witness (unless solely for impeachment) that has not been previously provided to opposing counsel.

16. OPPOSITION TO DEFENDANTS MOTION IN LIMINE NO. 16: TO EXCLUDE OPINIONS OF SHERYL J. WAINWRIGHT AND ALAN A. STEPHENS

PREFERRED DISPOSITION

Defendants claim Dr. Wainwright is not qualified to make the recommendations she has made in the life care plan for Mr. Hinson. They also claim her recommendations are not supported by experts. Both arguments are wrong. As shown below, Dr. Wainwright is qualified to make the recommendations she made. Additionally, two qualified physicians reviewed the life care plan and they both approved it. Because of this, the Court should deny Defendants' motion to exclude Ms. Wainwright's opinions from trial.

RELEVANT FACTS

Case Context

In July 2015, Mr. Hinson presented to Valley View Medical Center emergency room three times complaining of pain in his shoulder, pain with movement, and decreased movement. On the second and third time, Defendants knew Mr. Hinson was on blood thinner

medications and learned that he had a hematoma in his shoulder. These Defendant providers include Dr. Darrell Wilson on July 10, PA Kimberly Haycock on July 12, and Dr. Jared Cox on July 12. On July 10 and 12 Defendants discharged him without properly treating the hematoma and guarding against nerve impingement. Mr. Hinson also reported increasing pain and numbness. Unfortunately, by the time Mr. Hinson made it to his home in Texas and received the treatment he needed, it was too late, and he now suffers from permanent nerve damage.

Dr. Wainwright's Life Care Plan

Sheryl Wainwright is a Doctor of Health Administration, a registered nurse, certified life care planner, and certified case manager. She has testified as an expert in life care planning in hundreds of cases. Her CV is attached as Exhibit A.[15]

To form her professional opinions in this case, Dr. Wainwright did the following: (1) she evaluated Mr. Hinson over zoom videoconference, (2) she reviewed a letter written by Mr. Hinson's wife addressing how the injury has affected Mr. Hinson physically, mentally, and emotionally , (3) she reviewed Mr. Hinson's medical records and bills, (4) she reviewed the depositions in this case, and (5) she communicated with Mr. Hinson's treating and expert physicians. Based on all this information, Dr. Wainwright compiled a Life Care Plan for the future medical care that Mr. Hinson needs for his injuries. This future care includes physician services, pain management, physical therapy, counseling, medications, and replacement services. The total cost of this future care exceeds $408,000. The Life Care Plan was approved by Wilfred Miller, DO ("Dr. Miller"), a family medicine physician, and Julius Bishop, MD ("Dr. Bishop") an orthopedic surgeon.

[15] *See* Ex. A, CV of Dr. Sheryl Wainwright.

Physician Services

The Life Care Plan states the following about physician services: "Mr. Hinson continues to suffer from chronic nerve pain from his injury."[16] The Life Care Plan then includes three visits per year "to manage Mr. Hinson's chronic pain and loss of function."[17] This recommendation came from Dr. Miller, Mr. Hinson's treating family practice physician .[18] In his review of the Life Care Plan, Dr. Miller noted "seeing neurologist for nerve pain 3 times a year."[19]

Orthopedic surgeon Dr. Bishop also reviewed the life care plan and agreed that Mr. Hinson requires ongoing pain management physician appointments. In his deposition, Dr. Bishop was asked if he had the expertise to comment on the Life Care Plan.[20] Dr. Bishop testified "I feel like I can comment on the pain management on Page 8."[21] Dr. Bishop testified that he believed the amount of recommended pain management is a reasonable estimate.[22]

Physical Therapy

The Life Care Plan states the following about physical therapy: "Physical therapy is an important component of any pain management program. The goal of physical therapy is to teach proper body mechanics and exercises to help manage chronic pain symptoms and improve function." It then recommends eight to twelve visits per year.[23] This recommendation was approved by both Dr. Miller and Dr. Bishop.[24]

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[16] Ex. B, Life Care Plan.
[17] *Id.*
[18] Ex. C., Depo. Of Dr. Wainwright at 31:16-32:1.
[19] Ex. D., Dr. Miller Review Response to Life Care Plan at 3.
[20] Ex. E., Depo. of Dr. Bishop at 63:23-25.
[21] *Id.* at 64:1-2.
[22] Ex. E., Depo. of Dr. Bishop at 95:13-15.
[23] Ex. B., Life Care Plan.
[24] Ex. C., Depo. of Dr. Wainwright at 33:13-15.

Dr. Wainwright explained in her deposition that she made the recommendation because "in my experience with working with clients with chronic pain, physical therapy is usually a part of any chronic pain program, and it is extremely helpful."[25] She went on to explain that "Mr. Hinson suffers from extreme pain in his arm, loss of function, loss of strength, and we know that physical therapy is very helpful, A, in controlling pain and, B, in improving their functional abilities."[26] Dr. Wainwright also explained that she recommends physical therapy for her chronic pain patients that she case manages.[27]

When asked about the length of time for physical therapy, Dr. Wainwright stated, "so what happens with physical therapy is we try and get them to the point where they are as functional as they can be, but then the goal of continued physical therapy is to prevent them from deteriorating again."[28]

In his deposition, Dr. Bishop testified that he has the expertise to opine on the physical therapy recommendation.[29] Defense Counsel stated in his deposition "it makes sense that you likely refer patients to physical therapy" to which Dr. Bishop agreed.[30] Dr. Bishop also testified that "the frequencies listed [as to physical therapy] appear reasonable."[31]

Counseling

The Life Care Plan states the following about counseling: "Mr. Hinson has experienced depression, frustration and feelings of loss because of the injury. It has also affected the

[25] *Id.* at 34:3-6.
[26] *Id.* at 34:7-11.
[27] *Id.*at 34:13-15.
[28] *Id.* at 20-24.
[29] Ex. E., Depo. of Dr. Bishop at 64:1-2.
[30] *Id.* at 66:2-4.
[31] *Id.* at 66:5-7.

relationship with his wife." The Life Care Plan then includes six visits per year to help Mr. Hinson personally and ten to twelve total counseling visits with Mrs. Hinson to help their marriage. The plan indicates that the purpose of this counseling is "to help manage Mr. Hinson's psychiatric symptoms and to prevent a crisis" for his injuries.

When explaining the reason for her personal counseling recommendation in her deposition, Dr. Wainwright stated, "psychological therapy is very, very important for somebody that suffers from severe chronic pain and loss of function like Mr. Hinson."[32] Specifically for Mr. Hinson, she explained that "Mr. Hinson is in severe pain every single day. He's got loss of function. There are things that he used to enjoy that he can't enjoy anymore. He talked about the emotional impact. Certainly, in her letter Mrs. Hinson talked about the emotional impact of this injury."[33]

As to the amount of therapy, Dr. Wainwright made her recommendation based on her experience with her case management clients "that have severe chronic pain."[34] Dr. Miller also agreed with Dr. Wainwright's recommendation on counseling.[35]

Medications

The Life Care Plan states the following about medications: "Mr. Hinson has been prescribed Cymbalta for nerve pain." The plan includes "Cymbalta 60 mg a day" on a monthly basis for "nerve pain." This recommendation was made by Dr. Miller.[36] In his review of the Life

[32] Ex. C., Depo. of Dr. Wainwright at 37:10-12.
[33] *Id.* at 36:17-22.
[34] *Id.* at 41:14-16.
[35] *Id.* at 38:22-39:1.
[36] *Id.* at 42:24-43:5.

Care Plan, Dr. Miller noted "Neurologist has patient on Cymbalta 60 mg/day for nerve pain."[37] Dr. Bishop also approved the recommendation of Cymbalta for Mr. Hinson in his review of the Life Care Plan.[38] In his deposition, he also testified to the appropriateness of Cymbalta for nerve pain.[39]

In her deposition, Dr. Wainwright explained Cymbalta for Mr. Hinson saying "Cymbalta is a typical medication that is used for chronic pain, especially nerve pain, neuropathic pain. If that stops working, then they'll transfer him to another medication likely, but at this point we can't say what other medication."[40]

Replacement Services

The Life Care Plan states the following about replacement services: "Mr. Hinson used to do all the cooking, yard work, care maintenance, and handyman work around the house prior to his injury."[41] The plan recommends replacement services for 37 weeks per year for lawn care per year, twice a year season clean up (average three hours per session), ten hours per week of assistant care, and year car maintenance for two cars.[42] Both Dr. Miller and Dr. Bishop approved the replacement services.

In his deposition, Dr. Bishop testified, "I'm not an expert on the yard care and care maintenance. But I can comment on whether I think he would need that support or not."[43] He also testified that he believes Mr. Hinson needs support in "yard care, season clean up, assistant

[37] Ex. D., Dr. Miller Review of Life Care Plan at 7.
[38] Ex. F., Dr. Bishop Review of Life Care Plan.
[39] Ex. E., Depo. of Dr. Bishop at 65:12-16.
[40] Ex. C., Depo. of Dr. Wainwright at 43:24-44:4.
[41] Ex. B., Life Care Plan.
[42] *Id.*
[43] Ex. F., Depo. of Dr. Bishop at 64:4-8.

care, and care maintenance"[44] and that their frequency in the plan is "very reasonable."[45] Asked about the assisted care, Dr. Bishop stated "[W]ell, he doesn't have use of one of his hands, and so that would make many everyday tasks around the house difficult for him, the yard care and season clean included, grocery shopping, preparation of food."[46]

Dr. Wainwright testified of Mr. Hinson's replacement services stating "my understanding from him and from his wife is that that was something he really enjoyed doing. He enjoyed maintaining his home and maintaining his yard. He did all the lawn care. He maintained the gardens. He did all the cleanup."[47] From her interviews with Mr. Hinson and his wife's letter Dr. Wainwright learned that Mr. Hinson "spent quite a bit of time in his yard."[48] Dr. Wainwright went on to explain in her deposition that the Hinson's were forced to hire someone to mow and edge their lawn and paid them $45 a week. They also paid the same person $95 a month for the rest of the yard care for twelve months.[49] This is considerably more than the cost amount Dr. Wainwright included in the Life Care Plan.

Dr. Wainwright also explained the replacement services for attendant care stating "Mr. Hinson – he can't lift. He can't push. He can't pull. He can't – I mean, there are things that he used to be able to do, like sorting out his garage or going and shopping for certain things, driving for long periods of time."[50] Dr. Wainwright further described "the goal of a life care plan is to

[44] *Id.* at 64:8-13.
[45] *Id.* at 64:19-25.
[46] *Id.* at 65:3-6.
[47] Ex. C., Depo. of Dr. Wainwright at 46:9-15.
[48] *Id.*
[49] *Id.* at 47:3-15.
[50] *Id.* at 48:21-49:1.

return somebody to their prior level of function, and if we can't do that, to replace what they used to be able to do that they can't do for themselves anymore."[51]

ARGUMENT

In their Motion, Defendants argue that "*Wainwright's recommendations lack foundation*" and that she is not qualified because she does not have medical training.[52] They also argue that "*Wainwright's opinions are not supported by qualified experts.*" These arguments are wrong. With almost 40 years of experience in the medical field, Dr. Wainwright has the experience required to create a Life Care Plan with recommendations. As practicing and board-certified physicians, Dr. Bishop and Dr. Miller also have the training and experience required to approve of Dr. Wainwright's recommendations.

Rule 702 of the Utah Rules of Evidence sets forth the factors trial courts must consider when performing their "gatekeeper" role in screening out unreliable expert testimony.[53] In relevant part, Rule 702(a) states:

> (a) Subject to the limitations in paragraph (b), a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.[54]

"The first requirement for admissibility of expert testimony under Rule 702 is that the witness must actually be qualified. This requirement is construed *liberally.*"[55] "As a general matter, trial courts are to be given a wide measure of discretion in determining whether a particular witness qualifies as an expert."[56] While "a practitioner of one school of medicine is

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[51] *Id.* at 49:1-5.
[52] Defendants' Motions in Limine at 21.
[53] Utah R. Evid. 702, Advisory Committee Notes.
[54] Utah R. Evid. 702(a).
[55] *McCollin v. Synthes Inc.*, 50 F. Supp. 2d 1119, 1126 (D. Utah 1999) (emphasis added).
[56] *Thurston v. Workers Comp. Fund of Utah*, 2003 UT App 438, ¶ 19, 83 P.3d 391.

ordinarily not competent to testify as an expert in a malpractice action against a practitioner of another school due to a wide variation between schools in both precepts and practices,"[57] "[a]n exception to this rule is when an expert is knowledgeable about the applicable standard of care."[58]

To be admissible, an expert's opinions must satisfy a "threshold showing" of reliability under Utah Rule of Evidence 702. This threshold showing is satisfied if the principles and methods underlying the opinions "are generally accepted by the relevant expert community."[59] Here, Dr. Wainwright included in the Life Care Plan a statement that reads "[a] Life Care Plan is a dynamic document based upon published standards of practice, comprehensive assessment, data analysis, and research, which provides an organized, concise plan for current and future needs, with associated costs, for individuals who have experienced catastrophic injury or have chronic health needs *(IALCP – International Academy of Life Care Planners)*."[60]

Given this information on the basis of Dr. Wainwright's recommendations in the Life Care Plan, her opinions are admissible.[61] Defendants' criticisms go to the weight of her testimony, not its admissibility.[62] *See* Exhibit G (Memorandum Decision from Judge Heather Brereton denying a motion to exclude life-care testimony from Nurse Wainwright because criticisms against her "go to the weight of her testimony and can be brought out in cross-examination and resolved by the jury").

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[57] *De Adder v. Intermountain Healthcare, Inc*., 2013 UT App 173, ¶ 16, 308 P.3d 543 (cleaned up).
[58] *Sprague v. Avalon Center*, 2019 UT App 107, ¶ 29, 446 P.3d 132 (citing *De Adder*, 2013 UT App. 173, ¶ 17, 308 P.3d 543) (cleaned up); *see also Creekmore v. Maryview Hosp.*, 662 F.3d 686, 692-93 (4th Cir. 2011) (discerning no abuse of discretion where the doctor, who testified about the nursing standard of care, "regularly performed the procedure at issue and the standard of care for *performing the procedure is the same for doctors and nurses* (cleaned up)) (emphasis added).
[59] U.R.E. 702(c).
[60] Ex. B., Life Care Plan.
[61] *Johnson v. Montoya*, 2013 UT App 199, ¶ 13, 308 P.3d 566 ("We conclude that the trial court did not abuse its discretion when it admitted the vocational expert's testimony because there was a 'threshold showing' that her use of the surveys as part of her methodology was reliable and generally accepted in her field.").
[62] *State v. Turner*, 2012 UT App 189, ¶ 18, 283 P.3d 527 ("The factfinder bears the ultimate responsibility for evaluating the accuracy, reliability, and weight of the testimony, while the court makes the preliminary determination of admissibility.").

I. Dr. Wainwright is Qualified to Create a Life Care Plan with Recommendations.

Dr. Wainwright is a registered nurse. She received her degree at the Tauranga School of Nursing in New Zealand in 1984 and has a nursing license in New Zealand, Utah, Hawaii, and Nevada.[63] She has worked as a Nurse at Greenlane Hospital in Auckland, New Zealand, Waikato Hospital in Hamilton, New Zealand, Sanpete Valley Hospital, Community Nursing Services, and Health South Occupational Health and Urgent Care Clinic among others.[64] She has also worked as a Nurse Case Manager at Alta Health Strategies, LDS Hospital, IHC Health Plans, Inc., Champ Advocacy, Inc. Caring Hearts Home Health, and Synaptyx, LLC among others. Overall, almost 40 years of work in the medical field. In 2021, she also acquired a Doctor of Health Care Administration to better help her with her work.

Defendants cite the out-of-state case *Costello v. Christus Santa Rosa Health Care Corp.* to support their argument that Dr. Wainwright is not qualified to give her opinions. However, *Costello* is very different from this case. In *Costello*, the plaintiff had designated a nurse to give a medical opinion on the cause of someone's death.[65] The district court found, and the court of appeals agreed, that because of the structure of Texas regulations, a nurse could not testify as to causation.[66]

In this case, Dr. Wainwright is not testifying to causation. In fact, she was even asked this question in her deposition: "do you intend to offer any standard of care or causation opinions regarding the standard of care and treatment of Mr. Hinson against any defendants in this case?"[67] Dr. Wainwright responded, "No."[68] In other words, Dr. Wainwright has no opinions as to how Mr. Hinson arrived at his current condition. Dr. Wainwright is not making

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[63] *See* Ex. A., Dr. Wainwright CV.
[64] *Id.*
[65] *Costello v. Christus Santa Rosa Health Care Corp.*, 141 S.W.3d 245, 248 (Tex. App. 2004).
[66] *Id.*
[67] Ex. C., Depo. of Dr. Wainwright at 15:21-25.
[68] *Kilcrease v. T.W.E. L.T.D.*, No. 03-1013, 2004 WL 5509089 at *1 (D. Kan. May 18, 2024) (noting that life care planners typically base their opinions on conclusions by treating physicians and other professionals).

a medical diagnosis. Instead, her opinions are limited to Mr. Hinson's current and future needs based on his current condition. These recommendations are based on Dr. Wainwright's medical training, her almost 40 years of experience working with similar patients, Mr. Hinson's current actions compensating for his losses, and the recommendations of physicians.

Defendants also cite out-of-state district court cases to support their argument but these citations support Plaintiff's position. For example, these out-of-state district courts support the notion that "life care planners [can] testify to future health care needs, predicated upon the testimony of treating physicians as to the reasonable need for such care."[69] This is exactly what Dr. Wainwright did here. Dr. Wainwright created an initial draft of the Life Care Plan with recommendations and sent it to both Dr. Miller and Dr. Bishop. Dr. Miller is Mr. Hinson's primary care provider and the health care provider most aware of Mr. Hinson's medical needs. Dr. Miller even made changes to the Life Care Plan and Dr. Wainwright applied those changes to the final version of the Life Care Plan. Dr. Bishop is an expert orthopedic surgeon who has reviewed Mr. Hinson's medical records and other depositions in this case, including Mr. Hinson's.

Defendants cite to *State v. Ogden*, 2018 UT 8. That case, however, does not support Defendants' motion. In *Ogden*, the Utah Supreme Court ruled that future medications recommended in a life- care plan did not have sufficient evidentiary support because the "expert best positioned to opine on the medications Victim would need—Dr. Corwin—neither recommended nor prescribed any medication for her."[70] Indeed, "Dr. Corwin testified at the restitution hearing that to his knowledge, Victim was not taking any type of medication."[71] However, "Dr. Corwin concluded that Victim would benefit from therapy because she suffered significant psychological trauma."[72] Therefore, the Supreme Court held that the

[69] *Snider v. New Hampshire Ins. Co.*, 2016 WL3193473 at *2 (E.D. La. 2016); *see also.*
[70] *State v. Ogden*, 2018 UT 8, ¶ 56, 416 P.3d 1132.
[71] *Id.*
[72] *Id.*

"district court did not abuse its discretion by including these costs in the complete restitution award."[73] Here, both Dr. Miller and Dr. Bishop have recommended pain management doctor visits, pain medications, physical therapy, and replacement services. In addition, Dr. Miller has supported counseling services. Under *Ogden*, that is sufficient evidentiary support for those services to be admissible.

Defendants have also cited the district court case *Marland v. Asplundh Tree Expert Co.* This case is also distinguishable. There, the life care plan recommended twenty future surgeries and seven future laser ablation therapy sessions.[74] The court found that there was no clear evidence as to the quantity for this future medical care.[75] The court held that Dr. Wainwright could testify that the plaintiff required additional surgeries and laser therapy but disallowed any reference to a particular number of surgeries "outside of those stated by the parties' experts."[76]

Here, there is evidence supporting the amount and frequencies of the Life Care Plan's recommendations. Both Dr. Miller and Dr. Bishop approved of the Life Care Plan with its amounts and frequencies. Dr. Miller specifically recommended adding the three neurology/ pain management visits a year and the 60mg/per day of Cymbalta based on his knowledge of Mr. Hinson's current treatment. Dr. Bishop approved of the frequencies of pain management visits, and physical therapy in his deposition as well as the amount of replacement services. Dr. Wainwright explained in detail the recommendations for replacement services and their basis on Mr. Hinson's life before and after the injury.

In addition, while there "must be a reasonable probability" that a plaintiff suffered damages, "the level of evidence required to prove the amount of damages is not as high as

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[73] *Id.*
[74] *Marland v. Asplundh Tree Expert Co.*, No. 1:14-CV-40 TS, 2016 U.S. Dist. LEXIS 178979, at *2 (D. Utah Dec. 27, 2016).
[75] *Id.* at *6.
[76] *Id.* at *6,7.

what is required to prove the occurrence of damages."[77] Here, the Life Care Plan has ample support for all the recommendations and their amount and frequencies.

Nevertheless, if there is any question about whether a service in the Life Care Plan (that is not explicitly supported or rejected by a physician) is admissible, that issue should be reserved for trial when the underlying evidence can be more fully explored.[78] *Ogden* also addressed certain services (inpatient hospitalizations and intensive outpatient therapy) in a Life Care Plan that were not explicitly supported or rejected by Dr. Corwin. The Supreme Court did not rule on whether there was sufficient evidentiary support for these services, allowing that issue to be more fully explored on remand. "On remand, Victim may be able to justify an award of the items in Ms. Wainwright's report. But to meet that burden, the State or Victim will need to present evidence of her individual need for inpatient hospitalizations [and] intensive outpatient programs."[79] Courts around the country have allowed life care planners to opine on future care even when there is no underlying support from a physician.[80]

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[77] MUJI CV2002

[78] *See Wren v. Erie Ins. Co.*, No. 5:16-CV-190, 2017 WL 11180254, at *2 (N.D.W. Va. Dec. 21, 2017) ("When a motion in limine seeks to exclude a general category of evidence, the best course of action is to deny the motion and see how the case unfolds because a blanket exclusion could likely preclude a party from introducing evidence that a court finds admissible with the benefit of knowing the particular evidence and relevant context."); *State v. Hester*, 114 Idaho 688, 700, 760 P.2d 27, 39 (1988) ("The trial judge, in the exercise of his discretion, may decide that it is inappropriate to rule in advance on the admissibility of evidence based on a motion *in limine,* but may defer his ruling until the case unfolds and there is a better record upon which to make his decision.

[79] *State v. Ogden*, 2018 UT 8, ¶ 65, 416 P.3d 1132.

[80] *See, e.g.*, *Burress v. Winters*, No. CIV. WDQ-08-2622, 2010 WL 2090090, at *1 (D. Md. May 21, 2010) ("Numerous courts have permitted non-physicians to opine about future medical needs, even when their opinions are not supported by the recommendations of a physician."); *Deramus v. Saia Motor Freight Line, LLC*, No. 08-cv-23, 2009 WL 1664084, at *2 (M.D. Ala. June 15, 2009) (admitting a registered nurse's Life Care Plan without a physician's review where she reviewed medical records, depositions taken of the plaintiff's physicians, and met with the plaintiff); *Boden v. United States*, No. 7:18CV00256, 2019 WL 6883813, at *5 (W.D. Va. Dec. 17, 2019) ("She further based here opinion on over two decades of clinical experience as a registered nurse, a certified case manager, and a life-care planner, as well as her review of the pertinent scientific and medical literature reasonably relied upon by members of the life-care planning profession. While a physician's review might have benefitted Wirt's report, the court concludes that Wirt's methodology was sufficiently reliable as to be admissible. As such, any objections to Wirt's opinions must go to the weight of the evidence rather than its admissibility.").

II. Dr. Bishop and Dr. Miller Are Qualified to Support the Life Care Plan.

Defendants argue that Dr. Bishop and Dr. Miller are unqualified to support the Life Care Plan. Defendants argue generally that Dr. Bishop is an orthopedic surgeon and Dr. Miller is a family practice physician but does not explain why these specialties would not have the expertise to support the Life Care Plan recommendations. The truth is they do have the training and experience to support the Life Care Plan recommendations.

Dr. Bishop is an expert and practicing orthopedic surgeon. Dr. Bishop graduated from Harvard Medical School in 2004, participated in a general surgery internship for a year and then participated at the Harvard Combined Orthopaedic Surgery Residency Program for four years. He is currently an Associate Professor of Orthopaedic Surgery at Stanford University School of Medicine and works at the Department of Orthopaedic Surgery at the Stanford Medical Center and Lucile Packard Children's Hospital.[81]

As an orthopedic surgeon, Dr. Bishop is well acquainted with pain and pain management and often refers patients to pain management and prescribes pain medications. Defendants claim that Dr. Bishop "*would defer to a pain management specialist as to the future need for pain management and nerve pain medication.*"[82] This is not true. Dr. Bishop testified that he could comment on pain management.[83] Dr. Bishop also testified that he could "comment on the appropriateness of Cymbalta [medication] for nerve pain."[84] Defense counsel asked Dr. Bishop if he would defer to a "physician who specializes in pain management as to whether this is needed and how often" and he agreed.[85] However, that does not mean that Dr. Bishop does not have the expertise to comment on it. In fact, that is exactly

[81] Ex. H., Dr. Bishop's CV.
[82] Defendants' Motions in Limine at 23.
[83] Ex. E., Depo. of Dr. Bishop at 64:1-2.
[84] *Id.* at 65:15-16.
[85] *Id.*65:19-22.

what he testified to. Neither is there any requirement that Dr. Bishop must be of that specialty in order to comment on it.[86]

Dr. Bishop also often prescribes physical therapy and works with physical therapists to return patients to proper and healthy form. Dr. Bishop testified that he has the expertise to opine on physical therapy.[87] Indeed, Defense counsel even seemed to agree in the deposition that Dr. Bishop had the required expertise saying, "physical therapy, I –it makes sense that you likely refer patients to physical therapy, correct?"[88]

Dr. Bishop also testified that he could comment on Mr. Hinson's needed replacement services.[89] Defendants claim that Dr. Bishop "*acknowledges that [yard care and car maintenance] are not within his expertise*."[90] Dr. Bishop did say he is "not an expert on the yard care and car maintenance."[91] This is true. Dr. Bishop is an orthopedic surgeon, not a landscaper or mechanic. But right after that, Dr. Bishop testified that he "can comment on whether I think he would need that support or not."[92]

Dr. Miller is Mr. Hinson's primary care provider and a practicing family practice physician. Dr. Miller graduated from medical school in 1987 and finished his residency at LSU in 1990. Dr. Miller has been a Diplomat of the American Board Family Medicine as well as a Fellow of the American Academy of Family Practice for over 20 years.[93] As a family practice physician, Dr. Miller is knowledgeable in medicine in general. Dr. Miller manages patients' pain himself or refers them to a pain management specialist. Dr. Miller also refers patients often to

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[86] *See* De *Adder v. Intermountain Healthcare, Inc*., 2013 UT App 173, ¶ 16, 308 P.3d 543 (cleaned up); *Sprague v. Avalon Center*, 2019 UT App 107, ¶ 29, 446 P.3d 132 (citing *De Adder*, 2013 UT App. 173, ¶ 17, 308 P.
[87] Ex. E., Depo. of Dr. Bishop at 64:1-2.
[88] *Id.* at 66:2-4.
[89] Ex. E., Depo. of Dr. Bishop at 64:6-7.
[90] Defendants' Mots in Limine at 23.
[91] Ex. E., Depo. of Dr. Bishop at 64:4-5.
[92] *Id.* at 64:6-7.
[93] 287 Family Medicine, *The* Practice, (July 28, 2023), https://www.287familymedicine.com/the-practice

physical therapy and to counselling services. Dr. Miller treats patients with physical deficiencies, such as Mr. Hinson, and understands their limitations and needs for replacement services.

Dr. Miller reviewed the Life Care Plan and not only approved it but made additions to it. Dr. Miller's addition of three visits to a neurologist a year for pain management was based on his knowledge of Mr. Hinson's treatment. Similarly, Dr. Miller included the 60mg/per day of Cymbalta based on his knowledge of Mr. Hinson's prescriptions.

Both Dr. Bishop and Dr. Miller are qualified to opine on the recommendations in the Life Care Plan. Defendants' objections to Dr. Bishop, Dr. Miller, and Dr. Wainwright's specialties to support Plaintiff's damages is extreme. They seem to argue that Plaintiff should have hired and consulted a pain specialist, a neurologist, a physical therapist, a mechanic, a landscaper, a housekeeper, and every other exact specialty and expertise to prove his damages. But this is not the requirement under any rule or law.

Defendants argue that Dr. Wainwright never spoke to Dr. Miller or Dr. Bishop. But there is no requirement that this be so. Dr. Wainwright sent the life care plan to Dr. Miller and Dr. Bishop and asked them to comment and approve if they felt comfortable with it. They both approved it.

III. Dr. Stephens' Testimony Should Not Be Precluded.

Defendants have not argued that Dr. Stephens, Plaintiff's expert economist, is not qualified. Because Dr. Wainwright's opinion is appropriate and does have the proper foundation, Dr. Stephens' testimony, presenting the present value of those damages, should be allowed.

CONCLUSION

Dr. Wainwright is qualified to testify to the recommendations she made in the Life Care Plan. Dr. Bishop and Dr. Miller are qualified to support Dr. Wainwright's recommendations. For these reasons, the Court should deny Defendants' motion.

17. OPPOSITION TO DEFENDANTS MOTION IN LIMINE NO. 17: TO EXCLUDE UNTIMELY DISCLOSED EVIDENCE.

PREFERRED DISPOSITION

Defendants argue that Plaintiff disclosed medical records and medical bills and that Plaintiff should therefore be precluded from using these records and bills at trial. The Court should reject Defendants' motion because the disclosure was timely. In addition, if the Court were to find that the disclosure was untimely, Plaintiff should still be allowed to use the records and bills at trial because the untimely disclosure was harmless and because Plaintiff has good cause.

RELEVANT FACTS

1. On September 19, 2017, Plaintiff filed his Initial Disclosures, which included the following documents:[94]

    a. Conquest MD Spine Care & Sports Medicine billing: August 2015 – May 2016.

    b. Blue Cross Blue Shield of Texas Lien, which included the following bills:

        i. Health Texas Provider Net: July 2015 – August 2015

        ii. Baylor Regional Medical: July 2015

        iii. Bent Tree Family Physician: July 2015

[94] *See* Ex. I, Plaintiff's Initial Disclosures.

iv. ConquestMD Spine and Care: August 2015 – September 2015

2. On August 30, 2018, Plaintiff filed his First Supplemental Initial Disclosures with the following documents:[95]

a. 287 Family Medicine records: February 2018 – March 2018

b. The Rawlings Company Lien, which included the following bills:

i. Baylor Scott & White Institute for Rehabilitation billing: June 2016 – August 2016

3. Fact discovery in this case closed on December 2, 2019.[96]

4. On February 26, 2020, Defendant Dr. Wilson submitted his First Supplemental Initial Disclosures.[97]

5. With his First Supplemental Initial Disclosures, Dr. Wilson produced the following records:

a. Baylor Scott & White Institute for Rehabilitation records: June 2016 – August 2016

b. Bent Tree Family Physician records: May 2011 – January 2018

c. Functional Health Centers records: September 2015 - December 2015

d. ConquestMD Spine Care & Sports Medicine records: December 2015 – May 2016

e. Precision Cardiac & Vascular Care records: March 2018

[95] *See* Ex. J., Plaintiff's First Supplemental Initial Disclosures.
[96] *See* Ex. K., Sixth Amend. CMO.
[97] *See* Ex. L., Dr. Wilson's First Supplemental Initial Disclosures

f. Baylor Scott & White Dallas Diagnostic Association records: July 2015 – May 2019

g. Digestive Health Associates of Texas records: June 2017 – July 2017

h. 287 Family Medicine records; February 2018 - June 2019

6. On June 14, 2023, Plaintiff produced his Fourth Supplemental Initial Disclosures with the following documents:

a. Updated Medical Bill Summary

b. Baylor Regional Medical Center billing: July 2015

c. Bent Tree Family Physicians billing: December 2007 – January 2017

d. Baylor Scott & White Institute for Rehabilitation billing: June 2016 – April 2017

e. Functional Health Centers billing: September 2015 – December 2018

f. ConquestMD Spine Care & Sports Medicine billing: August 2015 – May 2019

g. Health Texas Provider Network billing: September 2016 – May 2019

h. 287 Family Medicine billing: February 2018 – January 2020

i. Baylor Scott & White Institute for Rehabilitation records: July 2016 – August 2016

j. Bent Tree Family Physicians records: October 2003 – July 2018

k. Functional Health Centers: September 2015 – December 2015

l. Conquest MD Spine Care & Sports medicine records: August 2015 – May 2016

m. Family Eye Clinic records: January 8, 2019

n. Precision Cardiac & Vascular Care: January 2020 – February 2020

o. Baylor Scott & White Dallas Diagnostic Association: July 2015 – May 2019

p. Digestive Health Associates of Texas: June 2017 – July 2017

q. 287 Family Medicine: February 2018 – January 2020

r. The Rawlings Company (Aetna) Lien

s. BlueCross BlueShiled of Texas Lien

7. Trial is scheduled for this case beginning on January 11, 2024.

ARGUMENT

Plaintiff has made no untimely disclosures. In the alternative, Plaintiff's disclosures have caused Defendants no harm. Plaintiff also has good cause for his disclosures.

I. Plaintiff Has Made No Untimely Disclosures.

Utah Rule of Civil Procedure 26(d)(1) states that "[a] party must make disclosures and responses to discovery based on the information then known or reasonably available to the party." The Advisory Committee Note for the rule states that "disclosures must be promptly supplemented as new evidence and witnesses become known as the case progresses." Rule 26(d)(4) states the consequence for failing to "disclose or to supplement" timely. According to Rule 26, disclosures are to be ongoing as evidence is discovered. Supplemental disclosures are to be expected. There is no set time as to when a document disclosure is considered untimely.

Defendants argue that Plaintiff's Fourth Supplemental Initial Disclosures are untimely because they were disclosed after the end of fact discovery. However, by their own logic, this would mean that Defendant Dr. Wilson's First Supplement Initial Disclosures were also untimely. Fact Discovery ended on December 2, 2019, and Dr. Wilson filed his supplement on February 26, 2020. According to Defendants' argument, Dr. Wilson's supplemental disclosures were untimely, and he should be precluded from using anything he disclosed in that First Supplemental Initial Disclosures.

But Plaintiff does not agree with Defendant's argument. The documents that both Defendants and Plaintiff have disclosed are medical records and medical bills. These documents become available as the Plaintiff continues to get healthcare and the parties make medical record requests from healthcare providers. Some medical record requests will discover one set of documents while a similar medical record request from the same healthcare provider might discover a different set of documents.

Plaintiff filed the Fourth Supplemental Initial Disclosures when his counsel learned that some of the requested medical records since the time of the last supplemental disclosures had not been disclosed. However, most of the documents had already been disclosed by Plaintiff or Defendants.

In addition, Plaintiff's Fourth Supplemental Disclosures were made almost seven months before trial. More precisely, 202 days before the start of trial. Plaintiff continues to receive treatment and, as healthcare records are requested, will continue to supplement the records and bills as required by Rule 26 before trial.

II. If Plaintiff's Disclosures Are Found to Be Untimely, Rule 26(d) Still Allows Them to Be Used at Trial.

When a disclosure is found to be untimely, Rule 26(d)(4) states that the party may still use the undisclosed material at trial if there was no harm done or if there was good cause in failing to disclose.[98] The Court of Appeals has also given considerable discretion to district courts on this matter stating "[w]here the district court determines that the non-disclosing party has met its burden to show harmlessness or good cause, we will not question that determination

[98] *Sleepy Holdings LLC v. Mt. W. Title*, 2016 UT App 62, ¶ 21, 370 P.3d 963, 969.

absent an abuse of discretion."[99] If the Court should find that Plaintiff's disclosures are untimely, Plaintiff should still be allowed to use them at trial because Defendants have not been harmed by the timing of the disclosures. In addition, Plaintiff has good cause for disclosing the documents when he did.

A. Plaintiff's disclosures have caused Defendants no harm.

Defendants have not been harmed by Plaintiff's disclosures because they already had them or already knew about them. Defendants already had copies of the majority of the medical records that Plaintiff produced with his Fourth Supplemental Initial Disclosures. Plaintiff had already disclosed many of the same records in his Initial Disclosures, prior supplemental disclosures, and answers to interrogatories. Defendant Dr. Wilson had also already disclosed many of the same records in his February 2020 supplemental disclosure. Out of the records Plaintiff disclosed in his Fourth Supplemental Disclosures, the following are records that Defendants already had for more than three years in their entirety before Plaintiff's disclosures:

- Baylor Scott & White Institute for Rehabilitation records
- Functional Health Centers records
- ConquestMD Spine Care & Sports Medicine records
- Baylor Scott & White Dallas Diagnostic Association Records
- 287 Family Medicine records

Some of the records that Plaintiff disclosed in his Fourth Supplemental Disclosures were already partially in Defendants' possession. For example, Defendant Dr. Wilson already had possession and disclosed Bent Tree Family Physician records from May 2011 to January 2018

[99] *Gen. Water Techs. Inc. v. Van Zweden*, 2022 UT App 90, ¶ 29, 515 P.3d 956, 965.

but then Plaintiff disclosed records from the same healthcare provider from October 2003 to July 2018. The discrepancy in the records attained is simply the nature of record requests. For whatever reason, one party will request records from a healthcare provider and receive certain records while another party will request records from the same provider and receive the same records plus more or sometimes even different records. The following are records that were part of Plaintiff's Fourth Supplement Initial Disclosures that Defendants already had possession of at least partially:

- Bent Tree Family Physicians records
- Digestive Health Associates of Texas

For the Precision Cardiac & Vascular Care records that Plaintiff disclosed, Dr. Wilson had also disclosed records from the same healthcare provider but for different dates. The only records that Plaintiff disclosed that had not been disclosed at all were the Family Eye Clinic records.

As for medical bills, Defendants already had possession of, or at least had knowledge of, almost all the medical bills. In his Initial Disclosures and First Supplemental Disclosures, Plaintiff disclosed two liens that contained some of the same medical bills found in Plaintiff's Fourth Supplemental Initial Disclosures. The following healthcare provider's were disclosed in both Plaintiff's Fourth Supplemental Initial Disclosures and in the two prior disclosed liens as having relevant bills:

- Baylor Regional Medical Center
- Bent Tree Family Physicians
- Baylor Scott & White Institute for Rehabilitation

- ConquestMD Spine Care & Sports Medicine
- Health Texas Provider Network

The only providers not found on those liens that were included in Plaintiff's Fourth Supplemental Disclosures are Functional Health Centers and Family Medicine Billing. However, Defendants had knowledge that there were bills from all of the providers disclosed in Plaintiff's Fourth Supplemental Disclosures because they had medical records from all those providers (with the exception of Family Eye Clinic Records). Defendants know and understand that when there is a medical record, there will most certainly be a medical bill. There are not many healthcare providers that work for free.

In summary, Defendants already had possession of the majority of the medical records that Plaintiff disclosed in his Fourth Supplemental Disclosures. In fact, two of Defendant Dr. Wilson's experts reviewed the Bent Tree Family Physicians, Baylor Regional Medical Center, and ConquestMD Spine Care & Sports Medicine records when assessing this case.[100] Defendants also had possession of some of the medical bills that Plaintiff produced but had knowledge of the majority of them.

Defendants have not been harmed by Plaintiff's disclosure. There is no new piece of information that will benefit Plaintiff to the Defendants' detriment in the records disclosed. Defendants imply they do not have enough time to review the records and bills before trial. The majority of them have already been reviewed and in Defendants' possession for at least three

[100] Ex. M., Document of Records, Depositions and Articles Reviewed by Kenneth Bramwell, M.D.; Ex. N., Document of Records Reviewed by Clive M. Segil, M.D.

years.[101] For the remainder, they still have almost five months and had almost seven months at the time of the disclosure.

Defendants claim they would need to reopen fact discovery in order to review the records and in case they need additional depositions. Interestingly, Defendants have failed to give a single reason why that would be the case. The reason is, they already had possession of most the medical records. They also already had knowledge that Plaintiff received treatment from all these providers (except for Family Eye Clinic). If they wanted a deposition, they could have requested them long ago.

B. Plaintiff is justified in the timing of his disclosures.

Medical records and billing requests are an ongoing process. As Mr. Hinson continues to receive treatment, there will continue to be additional records and bills. Plaintiff will continue to request medical records up until trial. In addition, every medical record request made to healthcare providers could yield additional records that were not previously produced. Because Plaintiff had already disclosed many records and because Defendants had also disclosed many records, Plaintiff's counsel had been under the impression that all records for those same providers had been disclosed. A review of those records showed that, while a majority of the records had already been disclosed between parties, some had not. For this reason, Plaintiff filed his Fourth Supplemental Initial Disclosures.

[101] Plaintiff's counsel believes he reviewed all the records disclosed between parties from initial disclosures, supplemental disclosures, answers to discovery, and so on. If there is any mistake in this brief, whether in relation to record or billing dates, or other, it was not intentional and done in good faith.

CONCLUSION

Plaintiff's disclosures were filed timely. With still almost five months left before trial begins, Defendants have plenty of time to review the small number of records that had not yet been disclosed. If the Court should find that the disclosure was untimely, Plaintiff should still be permitted to use the documents at trial because of Rule 26(d). Specifically, because Defendants have suffered no harm and because Plaintiff's were justified in the timing of their filing.

18. RESPONSE TO DEFENDANTS MOTION IN LIMINE NO. 18: TO LIMIT PLAINTIFF'S EXPERT MICHAEL BURG, MD TO STANDARD OF CARE OPINIONS:

Dr. Burg will testify consistent with his designation and deposition testimony. However, Plaintiff reserves the right to allow Dr. Burg to provide causation opinions at trial should Defense counsel elicit these questions from him or open the door to them. In addition, as part of Dr. Burg's explanation of the standard of care, he may need to explain the cause or potential causes of an injury to the jury. To the extent Defendants plan on limiting Dr. Burg's testimony in this capacity, Plaintiff opposes the motion.

DATED this 31st day of July 2023.

YOUNKER HYDE MACFARLANE

/s/Andres F. Morelli
Andres F. Morelli
Ashton Hyde
P. McKay Corbett
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of July 2023, I caused to be served, via the court's E-filing system or via email, a true and correct copy of the **OPPOSITIONS AND RESPONSES TO DEFENDANTS' JOINT MOTIONS IN LIMINE 1-18.**

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EXHIBITS

A. *Curriculum Vitae* of Sheryl Wainwright

B. Life Care Plan

C. Deposition of Dr. Wainwright

D. Dr. Miller response to Life Care Plan

E. Deposition of Dr. Bishop

F. Dr. Bishop response to Life Care Plan

G. Memorandum

H. *Curriculum Vitae* of Julius Bishop

I. Plaintiff's Initial Disclosures

J. Plaintiff's First Supplemental Initial Disclosures

K. Order for Sixth Amended Case Management Order

L. Dr. Wilson's Frist Supplemental Initial Disclosures

M. Exhibit from Deposition of Dr. Bramwell

N. Exhibit from Deposition of Dr. Segil