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

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| DAVID HINSON,<br><br>Plaintiff,<br><br>vs.<br><br>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.<br><br>Defendants. | **REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTIONS IN LIMINE 1-20**<br><br>Case No. 170500085<br><br>Judge JEFFREY C. WILCOX<br><br>Tier 3 |

David Hinson ("Plaintiff"), through his counsel of record, hereby submits this Reply Memorandum in Support of Plaintiff's Motions in Limine 1-20.

## ARGUMENT

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

The Court should grant Plaintiff's Motion in Limine No. 1. Defendants argue that the Court should deny Plaintiff's Motion in Limine No. 1 if Defendants' Motion in Limine No. 13 is

denied. Defendants provide no reason or explanation for why the two motions should be decided in conjunction. Instead, Defendants position is that:

> if Plaintiffs are allowed to suggest that defense verdicts somehow risk the safety (sic) the jurors and all patients in general, Defendants should be permitted to rebut that by suggesting that large damages awards in medical malpractice cases, which puts doctors out of business or dissuades people from entering the medical profession in the first place, risk the safety of all patients.

Rule 403 of the Utah Rules of Evidence sets forth that the Court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Utah R. Evid. 403. Defendants proposed "rebuttal" argument appears to be an attempt to instill fear in the jury that would cause a chilling effect and prevent them from finding against Defendants for reasons other than the merits of the case. References or suggestions relating to the burden of lawsuits generally or the effect of litigation or a judgment on the Defendants are irrelevant to the specific claims and defenses at issue and have no probative value. Further, such testimony invites the potential for unfair prejudice, confusing the issues, misleading the jury, and wasting time.

This kind of argument should not be allowed under any circumstance as it is irrelevant to the claims and defenses at issue, highly prejudicial, and any possible probative value is outweighed by the dangers of unfair prejudice, confusing the issue, and misleading the jury. Utah R. Evid. 401, 402, 403. Such references or suggestions would only serve to create sympathy for the Defendants, making the jury unfairly contemplate whether or not

to reach a decision based on the impact it may have on a party, and waste time as that sort of testimony will not advance any of the issues involved in the case.

Additionally, Plaintiff has agreed not to violate Utah's prohibition on reptilian or "golden rule" arguments by not asking the jury to place themselves in the plaintiff's shoes when awarding damages. *See Green v. Louder*, 2001 UT 62, ¶ 36, 29 P.3d 638 (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). However, Defendants' request that the Court preclude Plaintiff from making any references or arguments reminding the jury to consider the safety of the community is contrary to relevant Utah law on the matter expressly allowing such references or arguments and Defendants do not explain the basis to exclude such references or arguments.

Accordingly, the Court should grant Plaintiff's Motion in Limine No. 1.

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

The parties stipulate to Plaintiff's Motion in Limine No. 3. Therefore, the Court should grant Plaintiff's Motion in Limine No. 2.

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

The parties stipulate to Plaintiff's Motion in Limine No. 3. Therefore, the Court should grant Plaintiff's Motion in Limine No. 3.

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

The parties stipulate to Plaintiff's Motion in Limine No. 4. Therefore, the Court should grant Plaintiff's Motion in Limine No. 4.

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

The parties stipulate to Plaintiff's Motion in Limine No. 5 with a reciprocal stipulation to Defendants' Motion in Limine No. 14. Therefore, the Court should grant Plaintiff's Motion in Limine No. 5.

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

The Court should grant Plaintiff's Motion in Limine No. 6 because any probative value of evidence that a Defendant provided similar treatment in the past without complication is substantially outweighed by the dangers of unfair prejudice, confusing the issues, and misleading the jury. Defendants argue that the Court should deny Plaintiff's Motion in Limine No. 6 because the testimony is both relevant and admissible and Rule 404(b) was misapplied to the facts of this case.

Rule 403 of the Utah Rules of Evidence clearly sets forth that the Court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Utah R. Evid. 403. Notably, Defendants conflate the arguments Plaintiff wishes to preclude from introduction at trial with the testimony Defendants wish to introduce about their "medical decision-making process." While Plaintiffs agree that Defendants should be allowed to speak to their medical education, experience, and training *generally* as background information, it would be unfairly prejudicial, confusing, and

misleading to allow Defendants to indicate that they provided similar treatment as they provided to the Plaintiff in the past without complication.

Indeed, despite Defendants arguments to the contrary, both Rule 404(a) and Rule 404(b) apply in this case. Rule 404(a) of the Utah Rules of Evidence sets forth that: "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in conformity with the character or trait." Utah R. Evid. 404(a). Furthermore, Rule 404(b) sets forth that: "[e]vidence 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." Utah R. Evid. 404(b). The Utah Rules of Evidence clearly intend to exclude improper character evidence to prove conformity at trial. That is exactly the evidence that Plaintiff seeks to exclude here.

Importantly, such evidence has limited probative value as background information that speaks to the Defendants prior medical experience, education, and training. It does not speak to the claims and defenses at issue in the trial. Even if the Court grants Plaintiff's Motion in Limine No. 6, Defendants may speak about their medical experience, education, and training generally without specifically telling the jury that they have provided the same treatment as they provided to the Plaintiff in the past without complication. To allow the Defendants to introduce evidence that they provided the same treatment in the past without complication would only invite them to assume or reach the inappropriate conclusion that they must then have acted in conformity in this case when they provided the same treatment to the Plaintiff. That is not allowed by the Utah Rules of Evidence and would create a real danger of unfair prejudice, confusing the issues, and

misleading the jury. As such, the Court should grant Plaintiff's Motion in Limine No. 6 and preclude Defendants from introducing evidence, testimony, references, or suggestion that they have provided the same treatment as they provided to the Plaintiff in the past without complication.

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

The parties stipulate to Plaintiff's Motion in Limine No. 7. Therefore, the Court should grant Plaintiff's Motion in Limine No. 7.

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

The Court should grant Plaintiff's Motion in Limine No. 8 as Defendants have provided no reason or basis to deny it. Defendants mistakenly argue that Plaintiff has failed to provide any specific facts or arguments to preclude expert testimony from individuals other than properly designated experts. However, Plaintiff clearly set forth that Rules 26(a)(4) and 26(d) of the Utah Rules of Civil Procedure precludes any party from offering expert witness testimony from any individual other than those expert witnesses who have been properly designated.

Plaintiff further argues that properly designated experts should be limited to the testimony and opinions provided during their depositions in expert discovery and no other expert testimony should be introduced by other means or witnesses contrary to the Utah Rules of Civil Procedure. Specifically, Plaintiff argues that treating physicians who were not properly designated as expert witnesses should be limited to the fact-based opinions formed while caring for the Plaintiff and should not be permitted to offer opinions outside the scope of the care and treatment provided by the Plaintiff and expressed in their depositions.

Plaintiff's position and request is clear. The Court should preclude Defendants from offering expert witness testimony from any individual other than those expert witnesses that have been properly designated pursuant to Rules 26(a)(4) and 26(d) of the Utah Rules of Civil Procedure. Specifically, treating providers should be limited to fact-based opinions they expressed during fact discovery and should not be allowed to provide opinions outside the scope of the care and treatment they provided to Plaintiff. Defendants provide no legal or logical basis to deny Plaintiff's request. As such, the Court should grant Plaintiff's Motion in Limine No. 8.

**9. Any factual testimony from witnesses not properly identified.**

The Court should grant Plaintiff's Motion in Limine No. 9 as Defendants have provided no reason or basis to deny it. Defendants mistakenly argue that Plaintiff has failed to provide any specific facts or arguments to preclude Defendants from eliciting factual testimony from any individual not properly designated as a fact witness. However, Plaintiff clearly set forth that Rules 26(a)(5) and 26(d) of the Utah Rules of Civil Procedure precludes any party from offering factual testimony from any witness other than those witnesses who have been properly designated or identified.

Plaintiff's request is appropriate and supported by the Rules of Civil Procedure to prevent any unfair prejudice by way of surprise at trial. To the extent Defendants request that Plaintiff's provide a list of potential witnesses that were not properly designated as witnesses at trial, Plaintiff can only point to the previously named parties including, but not limited to, Valley View Medical Center and the emergency physician who have been dismissed from this case. However, it is not Plaintiff's role to guess or predict at what Defendants may do or whom they may wish to call at trial. Accordingly, the Court should grant Plaintiff's Motion in Limine No. 9.

**10. Any references to collateral source payments.**

Defendants agree that it would be improper to reference insurance payments made for past medical expenses or question Plaintiff about amounts paid out of pocket for medical expenses. Accordingly, the Court should grant Plaintiff's Motion in Limine No. 10.

As to Defendants' argument that future benefits are proper to reference at trial, Defendants have not shown what future benefits Plaintiff is entitled to that they would want to reference at trial. Any general references that Plaintiff may be entitled to future benefits would be speculation and prohibited by Rule of Evidence 403.

In addition, UCA § 78B-3-405(5) states that the only future collateral evidence admissible are those from "government programs that provide payments or benefits available in the future to or for the benefit of the plaintiff." Defendants have not designated any witnesses to testify to future government programs Mr. Hinson may benefit from. Specifically, Defendants would require an expert on governmental benefits to testify at trial. Government benefits are complicated and dependent on many different factors that may change over time or in certain situations. To allow Defendants to suggest to the jury that Mr. Hinson may have some future governmental benefit without expert testimony showing how that is the case would be extremely prejudicial to Plaintiff. Defendants have not designated any experts to provide such testimony. As such, attempting to present such evidence at trial would be inappropriate and prohibited by Rule of Civil Procedure 26(d).

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

Defendants agree that standard of care opinions should not be elicited from treating providers but curiously argue that does not apply to two of the four examples provided in the

Plaintiff's Motion. Defendants argue, without much explanation, that these two examples are somehow different from the others because they fall within the scope of general medical expertise and "specialized knowledge" that is not commonly known or well-understood by the lay juror. In essence, they argue that the answers to these two examples are inherently expert testimony that can only be provided by someone with medical expertise and "specialized knowledge" outside of a layperson's understanding.

It is difficult to understand Defendants argument and how such testimony is not by definition expert testimony that must first be properly disclosed pursuant to Rules 26(a)(4) and Rule 26(d) of the Utah Rules of Civil Procedure before a witness can provide it at trial. Indeed, this very issue is contemplated as part of Plaintiff's Motion in Limine Nos. 8 and 9. This is the exact kind of expert testimony and standard of care testimony that the Court must exclude because it was not properly disclosed and because those witnesses were not properly designated to offer such opinions at trial.

Allowing treating providers to provide such expert opinions at trial without having been first properly designated as experts and disclosing such opinions is not permitted by Rule 26 of the Utah Rules of Civil Procedure. Additionally, Rules 401, 402, and 403 of the Utah Rules of Evidence precludes the introduction of such testimony as it is irrelevant, highly prejudicial, and would constitute duplicative and cumulative testimony. As such, the Court should grant Plaintiff's Motion in Limine No. 11.

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

The Court should grant Plaintiff's Motion in Limine No. 12. Defendants argue that Plaintiff has failed to articulate any specific testimony from any witness regarding a non-party medical provider that is objectionable. Despite that, Defendants agree that trial witnesses will testify consistent with their depositions.

Defendants are seemingly confused by Plaintiff's request to preclude any arguments, statements or testimony seeking to allocate fault to a non-party medical provider. Indeed, Defendants sole basis for the Court to deny Plaintiff's request is the purported failure to articulate *specific* statements or deposition testimony regarding a non-party medical provider that is improper or objectionable. Defendants' argument makes no sense.

Plaintiff cannot point to specific statements or deposition testimony provided by any witness that is critical of a non-party medical provider that would be objectionable at trial because none of the witnesses in the case provided such testimony. Defendants have thus far failed to provide any notice of intent to allocate fault to a non-party medical provider or expert testimony to establish such fault. Defendants instead have affirmatively stated that they do not intend to allocate fault to the dismissed parties, Valley View Medical Center/IHC (now Cedar City Hospital) and Dr. Jared C. Cox, DO.

It is precisely Defendants' lack of arguments, statements, or testimony seeking to allocate fault to a non-party medical provider that the Plaintiff seeks to ensure is presented at trial on this issue. At this stage, any notice of intent to allocate fault to a non-party medical provider by the Defendants would be untimely and unfairly prejudicial to the Plaintiffs. It would be even more prejudicial if Defendants were allowed to make arguments, statements, or provide testimony

seeking to allocate fault to a non-party medical provider at trial without any prior notice or disclosure of the legal or factual basis to do so.

In short, Defendants must be precluded from presenting or soliciting any arguments, statements, testimony, evidence, or insinuations that might lead the jury to believe that a non-party medical provider provided substandard medical care and treatment, thus causing, or contributing to Plaintiff's injury because Defendants have not complied with Rule 9(l) of the Utah Rules of Civil Procedure to timely provide a factual and legal basis for the claim. Moreover, no statements or testimony have been provided to support such a claim in the case thus far. As such, the Court should grant Plaintiff's Motion in Limine No. 12.

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

The parties stipulate to Plaintiff's Motion in Limine No. 13 with a reciprocal stipulation to Defendants' Motion in Limine No. 11. Therefore, the Court should grant Plaintiff's Motion in Limine No. 13.

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

Defendants agree that speculative testimony is improper. Nevertheless, they argue that witnesses may have some recollection and/or can give an estimation even if they do not have a perfect memory. Plaintiff agrees. However, Plaintiff specifically requested that any speculative statements or testimony be barred pursuant to Utah R. Evid. 401, 402, and 403 and the Defendants agree. Therefore, the Court should grant Plaintiff's Motion in Limine No. 14.

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

**"finding Defendants innocent of negligence."**

The parties stipulate to Plaintiff's Motion in Limine No. 15. Therefore, the Court should grant Plaintiff's Motion in Limine No. 15.

**16. Inflammatory statements in opening or closing argument.**

The parties stipulate to Plaintiff's Motion in Limine No. 16. Therefore, the Court should grant Plaintiff's Motion in Limine No. 16.

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

Defendants have stipulated to Plaintiff's motion precluding any references to a person, party, or parties, who were originally named in this lawsuit, but may no longer be a party to the case. Specifically, Valley View Medical Center/IHC and an emergency room physician who were previously named in this lawsuit but have since been dismissed.

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

The parties stipulate to Plaintiff's Motion in Limine No. 18. Therefore, the Court should grant Plaintiff's Motion in Limine No. 18.

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

The parties stipulate to Plaintiff's Motion in Limine No. 19. Therefore, the Court should grant Plaintiff's Motion in Limine No. 19.

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

The parties stipulate to Plaintiff's Motion in Limine No. 20. Therefore, the Court should grant Plaintiff's Motion in Limine No. 20.

DATED this 7th day of August 2023.

*/s/Andres F. Morelli*

Andres F. Morelli
YOUNKER HYDE MACFARLANE, PLLC
*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 7th day of August 2023, I caused to be served, via the court's E-filing system or via email, a true and correct copy of **REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTIONS IN LIMINE 1-20** to the following:

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