NAN T. BASSETT, Bar No. 8909
CHELSEY PHIPPEN, Bar No. 13333
KIPP AND CHRISTIAN, P.C.
257 East 200 South, Ste 600
Salt Lake City, Utah 84111
Telephone: (801) 521-3773
nbassett@kippandchristian.com
cphippen@kippandchristian.com
Attorneys for Defendants Jared C. Cox, DO & Kimberly D. Haycock, PA

VAUN B. HALL #7393
CAMERON BEECH #15536
CAMPBELL, WILLIAMS, FERENCE & HALL
1245 East Brickyard Road, Suite 230
Salt Lake City, Utah 84106
Telephone: (801) 466-4266
Fax: (801) 466-4269
vaunhall@chfhlaw.com
cbeech@chfhlaw.com
Attorneys for Darrell L. Wilson, M.D.

FIFTH JUDICIAL DISTRICT COURT – CEDAR CITY

IRON COUNTY -STATE OF UTAH

DAVID HINSON, Plaintiff, v. DARRELL L. WILSON, M.D.; JARED C. COX, D.O.; KIMBERLY D. HAYCOCK, P.A.; IHC HEALTH SERVICES, INC.; IHC HEALTH SERVICES, INC. dba VALLEY VIEW MEDICAL CENTER; IHC HEALTH SERVICES, INC. dba CEDAR CITY HOSPITAL; JEFFERY L. BLEAZARD, M.D.; and DOE INDIVIDUALS 1 through 10; and ROE ENTITIES 1 through 10, inclusive, Defendants.	**REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' JOINT MOTIONS IN LIMINE 1-18** Case No. 170500085 Judge Jeffrey C. Wilcox

Defendants, by and through their respective undersigned counsel, hereby submit the following Reply Memorandum in Support of Defendants' Joint Motions in Limine 1-20 ("Reply") as follows:

REPLY IN SUPPORT OF DEFENDANTS' MOTION IN LIMINE NO. 1: COLLATERAL SOURCES

In Defendants Motion in Limine No. 1,[1] they request that any damages awarded to Plaintiff for economic losses be reduced by the amount of collateral sources. In his opposition, the Plaintiff relies upon Utah Code Ann. §78B-3-405(2) in arguing that any collateral source reduction may only occur after a finding of liability. Plaintiff mistakenly combines two different categories of damages and fails to appreciate the way the two are treated differently under Utah Code Ann. §78B-3-405(2).

Defendants concede that any evidence of **past** economic damages would appropriately be reduced by collateral sources after a verdict awarding such damages, if any. However, **future** economic damages are treated differently under Utah Code Ann. §78B-3-405. Pursuant to subsection 405(5), the Defendants must be allowed **to present evidence to the jury** regarding the various collateral sources that provide payments or benefits in the future. The statute reads in pertinent part,"

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

[1] See, *Defendants' Joint Motions in Limine 1-18* ("Defs. MIL"), Electronic Docket Record ("EDR") #266, Motion in Limine ("MIL") No. 1.

UCA § 78B-3-405(5),

For the reasons outlined above, Defendants should be allowed to offer evidence of governmental programs that provide payments in the future to or for the benefit of the Plaintiff.

REPLY IN SUPPORT OF DEFENDANTS' MOTION IN LIMINE NO. 8: SEQUENCE OF TESTIFYING WITNESSES

Defendants request the Court enter an Order requiring both parties to reciprocally identify the sequence of their testifying witness in order improve the efficiency of trial and to avoid surprise. The Plaintiff's object and argue this request is not within the proper scope of a Motion in Limine. Surely the Court has the ability to direct and control *anything and everything* that pertains to the efficient and fair presentation of evidence. The plaintiff suggests in his opposition that he will "do the [sic] best to give Defendants 24-48 hours advanced notice before calling a witness."[2] This is a courteous attempt but is unenforceable and doesn't provide any real assurances.

Defendants understand that trials don't always go as planned. However, without considerable "planning," including the anticipated order of trial witness, a trial will be a disaster. As a compromise, Defendants request the Court enter an Order that the Plaintiff will provide his anticipated sequence of testifying witnesses 4 days before the start of trial and Defendants will provide their anticipated sequence of testifying witnesses 4 days before the start of their case in chief. Changes may be made to the sequence, without question, 24 hours before the witness testifies. Any changes less than 24 hours must be for "good cause," which shall be liberally extended.

Such an Order provides adequate flexibility and assurances for both sides.

---

[2] See, *Oppositions and Responses to Defendants' Joint Motions in Limine 1-18,* EDR #274, MIL No. 8.

REPLY IN SUPPORT OF DEFENDANTS' MOTION IN LIMINE NO. 9: BAR NON-PARTY WITNESSES FROM THE HEARING

Defendants are willing to accept Plaintiff's offer to reciprocally exclude non-party expert witnesses from trial. However, Defendants request the Court enforce the customary "Exclusionary Rule" which excludes a non-party witness from trial until after the witness has testified.

In his opposition, Plaintiff argues that his friends and family should be allowed to attend the "public" trial.[3] Defendants have no objection to Plaintiff bringing his friends and family to attend trial. However, if any of the friends and family are on the witness list, the Court should exclude them from attending the proceedings until after they have testified.

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

Defendants hereby withdraw their Motion in Limine No. 10.

REPLY IN SUPOORT OF DEFENDANTS' MOTION IN LIMINE NO. 12: PRECLUDE LAY WITNESSES FROM OFFERING EXPERT TESTIMONY

Defendants request an Order precluding lay witnesses disclosed by Plaintiffs from offering expert opinions at trial. In response, the 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…"[4] However, Plaintiff nonetheless objects and complains the request goes too far. The plaintiff suggests the Court "should address objections about expert testimony as the evidence comes in live at trial."[5]

The plaintiff's suggestion to wait until "the evidence comes in live at trial" is ill-advised, and precisely the reason an Order from the Court is necessary. The adage, "You can't un-ring

---

[3] See, *Oppositions and Responses to Defendants' Joint Motions in Limine 1-18,* EDR #274, MIL No. 9.
[4] *Id.*, MIL No. 12.
[5] *Id.*

the bell after it's been rung" is scarcely more applicable than during a trial. It is nearly impossible for jurors to ignore evidence they have already seen and heard, even when instructed to do so. This is precisely why and order is needed from the Court on this issue.

Candidly, this type of limiting instruction is not difficult to implement and enforce. Clearly lay witnesses may testify about their own observations, e.g. "I have seen the plaintiff walk with a limp", or "The plaintiff uses his non-dominant hand to comb his hair and open bottles." These are examples of appropriate lay witness observations. However, what is not proper is the lay witness drawing expert conclusions about what they have seen, e.g. "The plaintiff can't take care of himself", or "The plaintiff is depressed." These are examples of what truly is testimony that goes "too far" is terms of what is appropriate for a lay witness may say.

For these reasons, this Court should enter an Order that lay witness may appropriately offer testimony regarding their lay observations, but the witness may not offer opinions or conclusions regarding their observations that are clearly better evaluated by experts. S*ee* U.R.E. 702(a). Counsel should be instructed to discuss the Order with each lay witness to ensure there are not inadvertent violations of the Order.

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

The Defendants request this Court preclude the Plaintiff from presenting or attempting to present evidence, comments, or arguments asking jurors to apply *any standard other than* the "Standard of Care" as outlined and described by the medical experts during trial. Any other "standard" is irrelevant in a medical malpractice action. This is the law. *See, e.g. DeAdder v. Intermountain Healthcare, Inc*., 308 P.3d 543, 547-548 (Ct. App. Utah 2013).

Surprisingly, Plaintiff objects and attempts to suggest more broad "standard" that is inconsistent with Utah law. In his opposition, the Plaintiff argues, "Failure to comply with the

standard of care or applicable safety rules /community standards is what Plaintiff is required to show." [6] (Emphasis added). This is simply false. The Plaintiff has not cited a single case that "requires" the plaintiff to demonstrate at trial that "safety rules" have been broken, or that "Community standards" have not been upheld. There is no such requirement or basis under Utah law for medical negligence claims.

What should be very apparent to the Court, is that the Plaintiff's true purpose in arguing against a clear and cogent presentation of the applicable "standard of care", is to gain some perceived advantage (*inter alia* David Bell and Don Keenan, "Reptile: The 2009 Manual of the Plaintiff's Revolution"), by appealing to the emotions of the jurors, which is precisely what the jury instructions tell the jury not to do. See, *Utah Model Jury Instruction, 2nd,* CV107.[7]

Here again, District Court Judge Lawrences' opinion provides helpful insight,

Although plaintiff correctly points out that one of [the] goals of tort law is to enhance safety and prevent future injuries to the extent possible, their argument is misplaced. Those concepts are the reasons that we have laws that allow for recovery in tort cases; they are baked into this State's jurisprudence. The jury's job is to apply that law to the facts of this case; not to apply their subjective concept of what safety should be.

Order, *Sprague v. Avalon Care Center, et al.*, Case no. 140908104, Third Judicial District Court, September 22, 2017 (emphasis added). See, *Defs. MIL,* EDR #266, MIL No. 13.

In sum, Plaintiff has failed to provide any compelling case law or authority to suggest there is any "standard" other than the standard of care. Safety rules and Community guidelines will serve only to confuse the jury. For the reasons outline in the Defendants' briefing, this Court should prohibit Plaintiff from presenting or attempting to present any evidence, comments

---

[6] See, *Oppositions and Responses to Defendants' Joint Motions in Limine 1-18,* EDR #274, MIL No. 13, p. 10.

[7] **CV107 Jurors may not decide based on sympathy, passion, and prejudice.**
You must decide this case based on the facts and the law, without regard to sympathy, passion, or prejudice. You must not decide for or against anyone because you feel sorry for or angry at that person or anyone else.

or arguments asking the jurors to apply any standard other than the standard of care provided by the medical experts.

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

Defendants request this Court exclude the opinions and testimony of Plaintiff's life care planner, Sheryl J. Wainwright ("Wainwright") and economist Alan A. Stephens ("Stephens"). The basis for this request is that Wainwright is unqualified to make many of the recommendation contained in her life care plan. Wainwright lacks the expertise to opine on the future care needs recommended in the life care plan and she has not supported those recommendations with testimony from qualified experts.

Plaintiff objects and argues that Wainwright is qualified and/or she has obtained the approval of other medically qualified physicians. It is worth noting here the Plaintiff's repeated use of the prefix "Dr." when referring to Wainwright in his Opposition.[8] Wainwright is not a medical doctor. The only medical credentials Wainwright possesses that are relevant to patient care and treatment are "RN" - registered nurse, and even those credentials appear to be seldom used. It appears from Wainwright's CV, that she hasn't worked as a bedside RN for more than two decades.[9]

In Utah, an RN is not permitted to diagnose medical conditions or write patient "orders" for medicine and therapies. See, Nurse Practice Act - Utah Code Ann. Sect. 58-31B-102(14). The simple truth is, in a clinical setting, it would be unlawful for Wainwright to write a prescription for Cymbalta, or to write an "order" for physical therapy. Therefore, the

---

[8] (See generally, *Oppositions and Responses to Defendants' Joint Motions in Limine 1-18,* EDR #274, MIL No. 16).

[9] *Id.*, Exh. A (CV of Wainwright).

"recommendations" contained in Wainwright's Life Care Plan ("LPC") for the Plaintiff are outside the scope of Wainwright's nursing licensure.

Plaintiff and Wainwright are well-aware of these restrictions, which is why Wainwright sends her LCP to other healthcare providers. However, just because someone has attended medical school does not mean they are an "expert" in *all things medical.* As stated in Defendants' moving memorandum, neither Julius Bishop, MD ("Dr. Bishop"), nor Willfred Miller, MD ("Dr. Miller") are appropriately qualified to support Wainwright's opinions. Dr. Miller is a family practice physician with no sub-specialty that would qualify him to testify about future nerve pain care and medication, physical therapy, individual and marriage counseling, yard work, car maintenance and future attendant care needs.[10] Likewise, Dr. Bishop concedes that he cannot comment on pain management or physicial therapy needs, is not an expert in marriage counseling and cannot opine on whether and how ofter Plaintiff may need his own counseling.[11] Therefore, Defendants' Motion in Limine No. 16 should be granted.

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

Defendants request that Plaintiff be precluded from using at trial approximately 800 pages of new records that were recently produced more than 3 ½ years after the close of fact discovery. Pursuant to Rule 26(d)(4) of the Utah Rules of Civil Procedure the untimely produced records should be excluded.

Plaintiff's first argument is that Defendant Wilson similarly provided records after the close of fact discovery. The time frame for this delay was almost 3 months. On the other hand,

---

[10] See, *Defendants' Joint Motions in Limine 1-18* ("Defs. MIL"), Electronic Docket Record ("EDR") #266, Motion in Limine ("MIL") No. 16, p. 23.

[11] *Id.*

the Plaintiff's delay in serving their Fourth Supplemental Disclosures was 3 ½ years. This difference is significant both in terms of time and impact on the case.

Plaintiff argues that most of the existence of the records was either known, or the records had been previously produced. To the extent Plaintiff's Fourth Supplement Disclosures contains records that had already been exchanged, Defendants withdraw their objection to those records. It should not be difficult for the parties to figure out which records were previously produced, and those that were not.

As to the records that were not previously produced, there are two categories of records. First, those records that were available to the parties, and therefore should have been produced, and second, those records which were not previously available. To the extent Plaintiff's supplement disclosures produced records not previously available to him, even if he had exercised due diligence to obtain them, Defendants concede that they were timely produced. However, based on the dates of these records as outlined in Defendants motion, it appears that the records were available to Plaintiff had he exercised due diligence to obtain them. For the reasons outlined in URCP Rule 26(d)(4), this Court should enforce the appropriate sanctions outlined in the rule, which includes, "that party may not use the undisclosed witness, document, or material at any hearing or trial…."

The Plaintiff unconvincingly argues that even if the disclosure is untimely, there is no harm. Setting any records that may have already been disclosed, there are still many records that were not, which were "partially in Defendants' possession." This argument is unclear and in any case, "partial" disclosure is not a defense to the requirements and penalties of Rule 26. Those portions of the records that were not disclosed in a timely manner should be excluded.

In a complex medical case such as this, where the allegations and defenses rest heavily on the medical and damage records, prejudice to Defendants from the failure to disclose such records is obvious, since Defendants are without the ability at this late date to conduct additional discovery related to the newly produced records. It follows that Defendants would be without the ability to defend against the additional documents at trial.

Should this Court decide to allow the Plaintiff to use the untimely disclosed records, the Court should also allow the Defendants to reopen fact discovery for 90 days and open expert discovery an additional 90 days beyond. This will of course necessitate the rescheduling of trial, yet Plaintiff objects to this solution. Plaintiff should not be allowed to have it both ways and produce new evidence, while at the same time preventing Defendants from conducting additional discovery. He should either be precluded from using the new records at trial, or discovery should be re-opened and trial rescheduled. To do otherwise unfairly favors the Plaintiff at the expense of the Defendants' rights and obligations to adequately evaluate and consider several hundred pages of additional records. Allowing the Plaintiff to use the records and preventing the Defendants from conducting additional discovery allows the Plaintiff to enjoy the proverbial "Have his cake and eat it too." This should not be allowed. If the untimely disclosure of records is as benign and unimportant as Plaintiff suggests, then precluding use of the records at trial should not impact the Plaintiff's presentation of his case. But if the opposite is true, and the untimely disclosed records are essential to the Plaintiff's case, then all the more reason why the fair administration of justice requires the trial be continued and discovery reopened for a limited time.

Based on the foregoing, Defendants' Motion in Limine 17 should be granted. In the alternative, should the Court be inclined to allow Plaintiff to utilize the records at trial, Defendants request the Court to re-open discovery and reschedule trial per the above proposal.

DATED this 9th day of August, 2023.

CAMPBELL, HOUSER, FERENCE & HALL

/s/ Vaun B. Hall
VAUN B. HALL
CAMERON BEECH
Attorneys for Darrell L. Wilson, M.D.

DATED this 9th day of August, 2023.

KIPP & CHRISTIAN

/s/ Nan Bassett
NAN BASSETT
Attorney for Jared Cox, D.O. and Kimberly D. Haycock, PA

CERTIFICATE OF SERVICE

On this 9TH day of August, 2023, I delivered, by the method indicated below, a true and correct copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' JOINT MOTIONS IN LIMINE 1-18** to the following:

___ VIA FACSIMILE ___ VIA HAND DELIVERY ___ VIA U.S. MAIL _X_ VIA COURT'S E-FILING SYSTEM	Ashton J. Hyde John M. MacFarlane Jayden G. Gray YOUNKER HYDE MACFARLANE 257 East 200 South, Suite 1080 Salt Lake City, UT 84111 *Attorneys for Plaintiff*
___ VIA FACSIMILE ___ VIA HAND DELIVERY ___ VIA U.S. MAIL _X_ VIA COURT'S E-FILING SYSTEM	Nan Bassett KIPP & CHRISTIAN 257 East 200 South, Ste 600 Salt Lake City, UT 84111 *Attorney for Jared Cox, D.O. and Kimberly D. Haycock, PA*
___ VIA FACSIMILE ___ VIA HAND DELIVERY ___ VIA U.S. MAIL _X_ VIA COURT'S E-FILING SYSTEM	Vaun Hall CAMPBELL WILLIAMS FERENCE & HALL 3920 S 1100 E, Ste 250 Millcreek, UT 84124 *Attorney for Defendant Darrell L. Wilson, MD*

KIPP & CHRISTIAN, PC

/s/ Crystal Bowden
Crystal Bowden
Paralegal to Nan T. Bassett