2009

Wilson v. IHC Hospitals Inc : Brief of Appellant

Utah Supreme Court

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JoAnn E. Bott, Sammi V. Anderson; Charles H. Dahlquist, David J. Hardy, Merrill F. Nelson; Counsel for Appellee.

IN THE UTAH SUPREME COURT

JEROME WILSON and LEILANI WILSON, as Guardians ad Litem for JARED TANNER WILSON, their minor child, Plaintiff/Appellant, vs. IHC HOSPITALS, INC., dba UTAH VALLEY REGIONAL MEDICAL CENTER, Defendant/Appellee.	Case No. 20090354 - SC

APPEAL FROM A FINAL JUDGMENT
HON. FRED D. HOWARD
FOURTH JUDICIAL DISTRICT COURT IN AND FOR
UTAH COUNTY, STATE OF UTAH

BRIEF OF APPELLANTS

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PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption on appeal.

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STATEMENT OF JURISDICTION

Jurisdiction in this Court is proper pursuant to Utah Code Ann. § 78A-3-102(3).

STATEMENT OF ISSUES

ISSUE I: Did the trial court err in repeatedly allowing defendant IHC to reference collateral source evidence in the presence of the jury, including that the Wilsons did not pay any "out of pocket expenses" for Jared's care, and that Jared is eligible for Medicaid? *Standard of review and preservation:* The question of whether evidence is admissible can involve "a number of rulings, each of which require a different standard of review." *State v. Workman*, 2005 UT 66, ¶10, 122 P.3d 639. Appellate courts review "the legal questions underlying the admissibility of evidence for correctness." *State v. McClellan*, 2009 UT 50, ¶17, 216 P.2d 956. Questions of fact are reviewed for clear error. *Workman*, 2005 UT 66 at ¶10. And finally, appellate courts "review a trial court's decision to admit or exclude specific evidence for abuse of discretion. *State v. Cruz-Meza*, 2003 UT 32, ¶8, 76 P.3d 1165. This issue was preserved through a motion and order in limine and repeated objections during the trial by the Wilsons. (Pre-Trial Hearing, 10/23/2008, R 8600, p. 23; Plaintiff's Motion in Limine Regarding Health Insurance, R 5414-5419) [1]

ISSUE II: Did the trial court err in determining that the IHC nurse training modules offered by the Wilsons to establish the negligence of the defendant nurses were authentic and relevant, but lacked foundation? *Standard of review and preservation: See*

[1] R cites refer to the court record. TR cites refer to the trial transcript.

Standard of Review for ISSUE I. The issue was preserved through proffer of the exhibits at trial. (TR 3446-3451)

ISSUE III: Did adverse counsel's ex parte meetings with Appellant's doctors in violation of Utah law prejudice Appellant's right to a fair trial and did the trial court err in allowing Appellant's treating physician, Dr. Stoddard, to act as our expert witness against him? *Standard of review and preservation:* This is an issue of first impression. Where unlawful ex parte communications between adverse counsel and the plaintiff's own doctors have occurred during trial or where adverse counsel, through ex parte communication with plaintiff's doctor, cause a key medical record to be changed, there should be a presumption of prejudice to plaintiff. Allowing Dr. Stoddard to testify in violation of *Barbuto* is a legal determination to be reviewed for correctness. Allowing Dr. Stoddard to testify as an expert not properly designated under Rule 26 is reviewed for abuse of discretion (*Pete v. Youngblood*, 141 P.3d 629 (Utah App. 2006). These issues were preserved through objections and motions at trial. (TR 1299-1300; 2293-2294; 3141-3154; 3429; 3468-3485; 3541-3542)

ISSUE IV: Did the trial court err in granting IHC's motion in limine and excluding the expert testimony of Dr. Fred Hyde, who would have testified regarding facts establishing the potential bias of the defense witnesses who are physicians practicing in Utah County? *Standard of review and preservation: See Standard of Review for* ISSUE I. The issue was preserved in the Wilsons' opposition to IHC's motion and proffered at trial. (R 5835-5902; TR 317-318, 3714-3715)

ISSUE V: Did the trial court err in admitting into evidence a memorandum decision of Judge Gary Stott in another case, which decision contradicted the Utah Court of Appeals' decision in *DeBry v. Goates*, 2000 UT App 58, 999 P.2d 582? *Standard of review and preservation: See Standard of Review for* ISSUE I. The issue was preserved through objection at trial. (TR 2520-2528)

ISSUE VI: Did the trial court's cumulative errors and IHC's counsel's repeated violations of the collateral source rule, *Barbuto*, and other rules deprive the Wilsons of their right to a fair trial? *Standard of review:* "Under the cumulative error doctrine, we reverse only when 'the cumulative effect of the several errors undermines our confidence ... that a fair trial was had.'" *Utah Chapter of Sierra Club v. Air Quality Bd.*, 2009 UT 76, ¶54, 644 Utah Adv. Rep. 27 (internal quotations omitted).

APPLICABLE STATUTES, RULES, AND ORDINANCES

Rule 608(c) Utah Rules of Evidence.

STATEMENT OF THE CASE

Nature of the case, course of proceedings, and disposition below

This medical malpractice case against IHC was tried to a jury from October 27-November 21, 2008.[2] During the trial, plaintiff moved for a mistrial (based on *Barbuto* and Collateral Source Rule violations, along with other irregularities), which motion was

[2] Claims against other defendants were settled on a "litigation-expense-only" basis before trial.

denied. On a 6-2 vote, the jury answered a single special interrogatory regarding IHC's alleged negligence in favor of the defendant.[3]

Based on the verdict, the trial court dismissed plaintiff's claims with prejudice on December 9, 2008. (TR 7832) Plaintiff's motion for new trial was denied, and this appeal was taken.

Facts

In the latter part of 1994, Leilani Wilson became pregnant with her third child, Jared. Due to complications in her prior pregnancies, she and her husband Jerrie made inquiries and selected a high-risk specialist, Dr. Joseph Glenn. (TR 523). While Dr. Glenn did his job (at least until he left on vacation), the Wilsons' claims are centered on the premise that IHC failed to do its part, and that IHC's failure to follow the plan set in place by Dr. Glenn resulted in the severe disabilities now suffered by Jared Wilson. Jared Wilson is a spastic quadriplegic and is severely mentally retarded.

IHC, the Doctors and the Wilsons Agree on a Plan to Protect Jared

[3] On a 6-2 vote, the jury answered the first question regarding IHC's negligence against Jared Wilson and, therefore, answered no other questions (TR 3900). In polling the jury the court asked the question, "Was that your verdict?" (TR 3901-3902). The question was misunderstood by the dissenting jurors who apparently thought they were being asked if this was the jury's verdict. Consequently, all eight jurors answered "yes." The following Monday one of the jurors, Mrs. Phillip, called the court and informed Judge Howard that two jurors had voted against the verdict. This prompted a telephone conference with counsel. It was agreed that steps would be taken to correct the record. (See R. 7125-7130). Later that day, however, defense counsel sent a letter to the court opposing any re-polling of the jury (R. 7124). Accordingly, plaintiff filed a motion to correct the record. (R. 7125-7130) Affidavits were also filed. (R. 7475-7477, and R. 7369-7371) Without addressing plaintiff's motion, the court signed a judgment stating the jury's verdict was 8-0. (R. 7632-7634)

On April 11, 1995, Mrs. Wilson's membranes prematurely ruptured ("water broke") and her husband drove her to an IHC facility, Utah Valley Regional Medical Center ("the hospital"). (TR 524) Dr. Glenn met them at the hospital. (TR 524) At the hospital, the Wilsons also spoke with Dr. Stoddard, a neonatologist specializing in the care of premature babies. Dr. Stoddard was reassuring, telling the Wilsons that the hospital was very capable in caring for premature babies. (TR 525, 526; 669) (The hospital statistics for 1995, which were withheld by IHC until the court ordered their production during the trial, substantiate this assertion.) At his birth, Jared was entered into the hospital's records as a 27-week baby in accordance with the findings of the doctors treating him. (TR 1486, 1487) The survival rate at the hospital for premature babies of 27 weeks gestation in 1995 was 100%, with the vast majority (84%) avoiding significant brain hemorrhage. (TR 1488)[4]

It was decided that Jared should remain in utero as long as it was safe for him to do so. However, with her membranes ruptured, it was known Leilani likely would eventually develop an infection in her womb, "chorioamnionitis." Because chorioamnionitis is known to impair the ability of the mother's body to convey blood (ischemia) and oxygen (hypoxia) to the baby, it would pose severe safety risks to the baby if he was not delivered at the first sign of infection. Jared was also breech. Accordingly, Drs. Stoddard and Glenn explained that the trauma of a vaginal delivery

[4] After litigation began, IHC claimed Jared was 25 weeks, even though he is repeatedly referred to as being 27 weeks in the medical records. However, even 25 week babies had a 79% chance of avoiding serious brain hemorrhage (TR 1490).

would create an increased risk of brain hemorrhage and must be avoided – meaning that it was imperative that Jared be delivered by C-section. (TR 527-528)

The Wilsons and the care providers agreed on a plan, written in Leilani's medical chart on April 11 (Trial Exhibit 1, p. L00083): 1) to hospitalize her; 2) have her carefully monitored; and 3) perform a C-section delivery at the first sign of either infection, labor, or fetal distress. (TR 529) Mrs. Wilson was hospitalized and remained there until Jared was born nine days later on April 20. (TR 529)

IHC Failed to Follow the Plan

A week after Leilani was hospitalized on April 18, Dr. Glenn went on vacation. (TR 2062) He arranged for a succession of doctors to be called by the nurses monitoring Leilani. The "call schedule" was written down and provided to the nurses. (TR 720; Trial Exhibit 1, p. L00085) Although Dr. David Broadbent was only scheduled to provide coverage for Leilani beginning in the early evening of April 19 until Dr. Steven MacArthur took over on the morning of April 20, Dr. Broadbent was willing to stay involved as long as necessary. (TR 2071). Dr. MacArthur understood that he was on call beginning at 8:00 a.m. (TR 2850) Neither Dr. Broadbent nor Dr. MacArthur had ever met Mrs. Wilson. (TR 531, 542; 2045-2046; 2866)

Significant changes occurred in Leilani's condition the night of April 19. A nurse called Dr. Broadbent and he came in to see her. (TR 2046) Dr. Broadbent remained at the hospital for several hours during the night, expecting to do a C-section in the early hours of April 20. (TR 2060, 2067-68) Dr. Broadbent's detailed evaluation and analysis of Leilani and Jared placed him in a position where he was on the verge of performing

the C-section. (TR 2043) Among other things, Mrs. Wilson had an elevated temperature; however, Dr. Broadbent wanted to wait for her temperature to reach 100.4 degrees Fahrenheit (38 degrees Celsius), which he understood to be the accepted benchmark to officially qualify as a maternal fever. (TR 2060-2061) Dr. Broadbent's testimony is undisputed that once Leilani's temperature reached 100.4 he would have immediately proceeded with a C-section. (TR 2060-2061)

At 4:30 am, Dr. Broadbent went to his nearby home, leaving specific instructions with the attending nurse (Rebecca Berg) to call him immediately when a temperature spike of 100.4 degrees or greater occurred. (TR 2060-2061) Clearly, had he been called, he would have come back to the hospital and performed the delivery.

Moreover, had Dr. Broadbent been informed of the development of decelerations in the fetal heart tracing (see below), he never would have left the hospital at all. (TR 2057). However, nurse Berg let Dr. Broadbent leave without telling him about two severe "decelerations" which appeared in Jared's heart tracing, at 3:24 am and at 4:14 am. (TR 2056) Dr. Broadbent's undisputed testimony is that he would not have left the hospital had Berg advised him of these decelerations. (TR 2057)

At 6:00 am, there was a nursing shift change. The evidence shows that either: 1) Nurse Berg failed to inform her replacement, nurse Mehew, of Dr. Broadbent's explicit instructions; or 2) Nurse Berg told nurse Mehew of Dr. Broadbent's directions, but Mehew simply disobeyed them. (TR 1041-1045). Either way, it is undisputed that Mehew never contacted Dr. Broadbent.

At 6:40 a.m., Mehew recorded Leilani's temperature at 100.9 degrees (TR 1319), but didn't inform Dr. Broadbent, who was still on call for another hour and twenty minutes. Instead, she waited until after 7:00 am and then called Dr. MacArthur. (TR 1323-1325) Because of his lack of knowledge of the circumstances and of Broadbent's decision, Dr. MacArthur did not appreciate the significance of the development. (TR 2908-2912; 2921-2922)

Due to these communication failures, the agreed plan was not followed. Had Mehew called Dr. Broadbent, he would have delivered Jared through C-section by 7:30 am (TR 2059) – seventy minutes before the irreversible harm began.[5] Instead, Leilani delivered vaginally at 9:33 am (Trial Exhibit 1, p. L00127) (TR 1903), without a physician overseeing her labor. (TR 540-541, 2912-2913) After Dr. MacArthur's late arrival, he commented in the delivery room about the obvious presence of infection, and wrote "grossly infected" in the medical record. (TR 2874; Trial Exhibit 1, p. L00086) Chorioamnionitis was listed as a post-birth diagnosis. (Trial Exhibit 1, p. J00002-J00004) Jared was severely hypoxic (oxygen deprived), was extremely pale, and lifeless. He was not breathing and had no heartbeat. (Trial Exhibit 1, p. L00127) (TR 1506-1508)

Jared Suffered Severe Brain Damage Due to IHC's Failure to Follow the Plan

Due to the immaturity of the blood vessels, premature babies' brains are more susceptible than term babies to brain hemorrhage and trauma, including hypoxic/ischemic insult, is a recognized cause of such hemorrhages. (TR 1123-1132) Inadequate

[5] According to Appellant's expert testimony, the significant hypoxia/ischemia injury to Jared did not occur until after 8:40 am. (TR 1903-1904) The jury, of course, never reached this issue.

oxygenation damages the small blood vessels which causes them to leak once normal blood flow resumes. This leakage is normally slow and the brain hemorrhages are often undetectable for several days. (TR 1929) An ultrasound done on Jared's brain the day after his birth came out normal. (TR 1926-27) This evidence is important because it is indicative that there was no congenital defect. (TR 1942) Following the pattern of babies who have been subjected to hypoxic/ischemic insults, a second ultrasound done at ten days showed that severe bilateral hemorrhages had occurred in Jared's brain some time in the intervening nine days. (TR 1927-28)

Brain hemorrhages in newborns are classified in Grades I through IV. Grades I and II typically do not result in significant damage, while Grades III and IV do. Jared's were Grade IV, which caused catastrophic brain injury. (TR 1905) Had the severe hypoxic insult been avoided, he would not have been brain damaged. (TR 1954)

Dr. Minton Recognized IHC's Negligence and Encouraged the Wilsons to File Suit

Over the several months following his birth, Jared remained hospitalized, with Drs. Stoddard and Stephen Minton overseeing his care. (TR 583; 1541) A close confidential relationship developed between Jared's father, Jerrie, and Dr. Minton. (TR 583-34, 601-602; 2617) As time passed and the severity of Jared's disabilities became more readily apparent, Jared's parents came to the realization that Jared would need 24 hour a day care throughout his life and that they needed to explore what legal options Jared may have. In the process of doing so, Jerrie consulted Dr. Minton, who encouraged him to bring a claim on Jared's behalf. (TR 601) The Wilsons' legal counsel, who were considering the case, were unwilling to make a decision based on Jerrie's representations

of what Dr. Minton's testimony would be and wanted to speak directly with Dr. Minton before agreeing to take the case. Accordingly, Mr. Wilson arranged a meeting at Tony Roma's restaurant in Provo on September 8, 1998, where Dr. Minton, Jerrie Wilson, and attorneys David Richards and Roger Christensen were present. (TR 2620) After meeting with Dr. Minton, they accepted the case and the legal process was initiated. Mr. and Mrs. Wilson made no claims of their own. Their role has strictly been limited to acting as co-guardians ad litem for Jared with respect to his claims.

1. After an Ex Parte Meeting With IHC's Defense Counsel, Dr. Boyer (One of Jared's Treating Physicians) "Re-Evaluated" His Original Reading of Jared's MRI to Fit IHC's Defense Theory

A critical medical record in this case is an MRI of Jared's brain, which was taken on February 21, 2003, at Primary Children's Medical Center, an IHC facility. Dr. Richard Boyer, the head of the Pediatric Neuroradiology Department at Primary, acting as Jared's doctor and unaware of the pending litigation, interpreted Jared's MRI, concluding that Jared's brain injury was consistent with a hypoxic/ischemic birth injury. (TR 2453-2454) This interpretation was contrary to IHC's defense.

On April 9, 2003, IHC's litigation counsel, JoAnn Carnahan-Bott, accompanied by an IHC Risk Manager, without any prior notice or disclosure to the Wilsons or their counsel, held an ex parte meeting with Dr. Boyer.[6] (TR 2455) After the meeting, on the same day, Dr. Boyer changed his interpretation of Jared Wilson's MRI, purportedly discovering a congenital abnormality. (TR 2458) Now aware of the lawsuit, Dr. Boyer

[6] It is important to note that while Dr. Boyer is not an actual employee of IHC, more than 95% of his income is derived from work he performs for IHC. (TR 2449)

also added a comment seemingly directed to a future jury, "there is no need to implicate other causes of brain injury such as infection, neoplasm or external trauma to explain the combination of findings demonstrated on this imaging study." (TR 2460-2461) (emphasis added) Dr. Boyer even went so far as to bill IHC's litigation counsel for changing Jared's medical record. In a letter sent to counsel, he stated:

> I am enclosing the addendum dictated after our meeting today in the above case. It is listed as a preliminary report, but has been finalized in our hospital information system. Charge for today's services for one hour at $200.
>
> Prompt payment directly to me will be appreciated.
>
> I hope that my services have been helpful to you and your client. I will await hearing from you regarding any further action in this matter. (TR 2455) (emphasis added)

Neither Dr. Boyer nor IHC's counsel voluntarily revealed the meeting or the reason for the change in the medical record. (TR 2561) On the contrary, reference to that meeting was intentionally excluded:

> Q. And you -- you intentionally left out any reference to the meeting with IHC's counsel and risk manager, didn't you?
>
> * * * *
>
> A. There's no reason for that to be in the medical record. The record should not reflect that this is a legal action. What I said in the addendum is that I had the opportunity to review the scans again today, and it would be inappropriate to enter into the medical record the context in which I did that.
> Q. The context being a meeting with IHC's counsel and risk manager?
> A. That's correct. . . .

(TR 2561)

This meeting and the reason for the change went undiscovered for two years until Boyer was served with a subpoena *duces tecum* to give deposition testimony on September 20, 2005. (TR 2560-61) This is important because Dr. Boyer was Jared's treating physician, thus, this new interpretation was taken at face value and used by all subsequent treating doctors, (TR 2560-61, 2570), and was relied on by the expert witnesses in developing subsequent opinions.

2. Based on the Changed Medical Record, Dr. Boyer Testified Against Jared as an Expert Witness at Trial

After the change, IHC designated and used Dr. Boyer as its main pediatric neuroradiology expert. (IHC's Expert Witness Disclosures, at 752-916) To counter this problematic testimony, the Wilsons retained a highly respected pediatric neuroradiologist, Robert A. Zimmerman, MD. (TR 2970-2988)[7] Dr. Zimmerman testified that Dr. Boyer's initial interpretation of the MRI of Jared's brain was correct and that Dr. Boyer's finding of cortical dysplasia after his *ex parte* meeting with IHC's counsel had no basis. (TR 3011)

In closing argument, IHC argued that Appellant's own doctor should be believed over a highly paid expert. (TR 3856-3861) "Now, can I just suggest something? You've got Dr. Zimmerman on one side, who is paid to look and not see. You've got Dr. Boyer on the other side who wants to have good patient care . . ." (TR 3861)

3. Dr. Boyer Has Changed Medical Records in Other Cases at IHC's Request

[7] Dr. Zimmerman has authored portions of approximately 100 medical textbooks (TR 2972-2973). Utilizing an individual of these credentials did not come without a price ($7,000 per trial day). (TR 3017-3018)

On more than one occasion, Dr. Boyer, at the instance of IHC's litigation counsel and risk management, has changed his interpretation of film studies of the brains of other children in medical negligence cases where IHC was a defendant. (TR 2464) In the case of *Butterfield v. IHC*, Dr. Boyer's interpretation of a CT scan of Kiley Butterfield's brain was "birth asphyxia." After meeting with IHC's litigation counsel, Ms. Carnahan-Bott, and a representative of risk management, Dr. Boyer changed his opinion to "the pattern of brain injury is not typical of an intrapartum hypoxic-ischemic event or birth asphyxia." (TR 2475-76)

Dr. Boyer also admitted that Jared Wilson and Kiley Butterfield were not his only patients where similar things had occurred. He admitted that after having *ex parte* meetings with IHC's litigation counsel his interpretations of radiological studies of the brains of other children seeking damages against IHC in litigation, had been changed. He denied, however, having the ability to remember or discover the names of these other children. (TR 2479-80; 2567)

4. IHC Refused to Produce, and Misrepresented, its Own Statistics Regarding the Probable Prognosis of Premature Babies

A major issue raised by IHC's defense was the fact that Jared was premature. (TR 476, 479, 480-483, 487, 489, 490-91, 503, 517) Fortunately, for many years prior to 1995, the hospital kept detailed statistics on the outcomes of premature babies born in the hospital. Although these statistics were routinely used by doctors in counseling parents and were even used with the Wilsons (TR 526-527) IHC refused to produce them. (R. 260-261; R. 350-430) IHC claimed privilege and the court allowed it to do so (R. 1459-

1465, 1843-1846), but belatedly ordered their production *during* the trial. (TR 691) The statistics revealed that at 27 weeks, Jared had an almost 100% chance of survival. (TR 1488-1495). In addition, he had an 84% chance of avoiding significant brain hemorrhages. (TR 1488) However, this is not what IHC had told the jury. (TR 500) (In its opening statement, IHC represented that due to his prematurity, Jared only had a 30% - 50% chance of survival and only a 15% - 25% chance of being normal if he did survive. IHC claimed that statistically the odds against Jared were 9-1 (TR 500), when in reality, they were almost 9-1 in his favor.)

5. After Meeting *Ex Parte* With IHC's Counsel, Dr. Minton Became Adverse to Jared

After meeting *ex parte* with IHC's attorneys and in spite of his prior statements to Jerrie Wilson and counsel, Dr. Minton also assumed the role of an expert witness adverse to his patient. (Minton Deposition, pp. 18-19) No claims were ever made or threatened against Dr. Minton. (TR 1711) He also claimed to have no memory of the meeting he had with plaintiff's counsel and Jerrie Wilson at Tony Roma's on September 8, 1998. (TR 1700-1702). While Dr. Minton was ultimately precluded from being called by IHC at trial, much of the damage was already done.

6. The Trial Court Repeatedly Refused to Admit the IHC Nurse Training Modules that IHC Withheld

IHC's nursing communication requirements and protocols were a central issue in the case for obvious reasons. Beginning very early in discovery, the Wilsons made repeated formal efforts to discover IHC's relevant nursing protocols and training

materials. Nevertheless, none were produced. However, such documents do exist and were offered to the trial court below.

In searching the case file from another matter, counsel for the Appellant found IHC's Nurse Training Modules from the relevant time frame, along with a cover letter from IHC's counsel, Ms. Carnahan-Bott. (*See* proposed trial exhibits 8, 9, 10 and 36). (TR 1187) Proposed exhibit 36, entitled "Utah Valley Regional Medical Center, Mother-Baby Unit, Fetal Monitoring, Module 6" is dated October 1993 and was prepared by Jeaniel Brewer, R.N., IHC's Clinical Educator (*see* proposed Ex 36, second page and eleventh page). (TR 3404) On page 10 of Module 6 (proposed Ex 36) it states, in bold print, "**Notify physician of presence of deceleration in a FHR [fetal heart rate] Tracing.**"

Proposed Ex. 8 is undated. However, all its cited sources are dated prior to 1995. (TR 1191-92) It mandates notifying the physician of decelerations (*see* Page 15). More than once Appellant moved the court to admit this critical evidence, but the court refused to do so. This was true even though the court found them to be authentic and no privilege or Rule 403 issue was raised. The court seemed to acknowledge their relevance, but said that "foundation" was lacking. (TR 3451).

7. IHC Caused One of Jared's Retained Expert Witnesses to Withdraw

After receiving the notice of Dr. John Marshall's status as plaintiff's liability expert, IHC's in-house counsel made a call to Dr. Marshall's wife, Elaine Marshall, who was the Dean of Nursing at Brigham Young University. As with most deans, one of Mrs.

Marshall's main responsibilities was securing contributions for the Nursing School. (TR 1816-35)

There is dispute concerning precisely what was said in the telephone call. However, it is not disputed that the purpose of the call was to inform Dean Marshall that IHC took issue with her husband's acting as an expert witness for Jared Wilson, and that the call caused enormous stress for her. (TR 2732) Dr. John Marshall initially refused to withdraw and he and his wife were stalemated over the issue for several weeks. (Marshall Aff., ¶ 7.e. and f., Plaintiff's Motion to Replace Expert Witness, at 1299-1303) However, eventually he relented and withdrew. (Marshall Aff., ¶8.g., Plaintiff's Motion to Replace Expert Witness, at 1299-1303). Shortly thereafter, IHC announced an $800,000 donation to BYU Nursing (TR 1814, 1844; 2734), the largest ever.

8. IHC's Trial Counsel "Appeared" on Behalf of a Treating Doctor Who Was Not a Party to the Litigation, thus Circumventing the Court of Appeals Holdings in *Sorensen v. Barbuto* and *DeBry v. Goates*

One of Leilani Wilson's (and Jared's) treating doctors was Dr. Steven Clark, an IHC employee. Prior to trial, Dr. Clark left IHC and took a position with a different healthcare system. (TR 2951) Appellant made a formal request for all documents relating to Dr. Clark's departure (Plaintiff's 30(b)(6) Notice to Designate and Request for Production of Documents, at 1450-1453), which IHC refused to produce at a hearing on June 30, 2006. At the hearing, IHC's counsel represented to the court that IHC had no documents relating to Dr. Clark. (TR 2295-2299) At trial, however, it was discovered that IHC maintained a file several inches thick on Dr. Clark, including documents demonstrating that Dr. Clark left under adverse circumstances. (TR 2954-56)

IHC apparently became concerned over the possibility that Dr. Clark might speak with his former patient's counsel. Accordingly, on August 3, 2007, long-time IHC defense counsel Charles Dahlquist took the unusual approach of entering an "appearance" in the case on behalf of non-party Dr. Steven Clark. (TR 3697) While it was strange for an attorney to appear on behalf of a non-party (even claiming independent discovery rights), the plaintiff did not appreciate the motivation behind this behavior until trial. By then, Mr. Dahlquist had dropped his "appearance" for Clark and assumed the role of lead IHC counsel. It was then discovered that counsel had been meeting with Dr. Clark and preparing him to be an expert witness for IHC against Jared Wilson. (TR 843-845; 1279)

9. IHC Intentionally Introduced Collateral Source Evidence Regardless of the Rules of Evidence and Court Rulings

Beginning with the first witness (TR 615) and continuing through closing argument (TR 3819-3820), a major defense theme was that collateral sources (including private insurance and Medicaid) had been and would be taking care of Jared Wilson's needs. In spite of a pre-trial motion and order *in limine* and countless objections, at least 17 separate violations of the collateral source rule occurred.

The first violation of the collateral source rule occurred with the first witness on October 30, the second day of trial. *See* 10/30 Trial Tr. Vol. 4, 618-623. While questioning Mr. Wilson, counsel elicited testimony related to governmental programs that had provided respite care to Jared in the past. *Id*. 618:23-619:13. He went on to catch both the court and counsel off guard by asking, "Now, we have your medical expenses,

but we don't have the amount that you've paid for out-of-pocket expenses. So I'm going to ask you some specific questions." *Id*. 619:22-620:8.

Defense counsel, knowing that Medicaid had purchased Jared's chair, then asked Mr. Wilson how much he personally spent for Jared's wheelchair. *Id*. This question drew an objection, with a resulting bench conference. *Id*. 620-621:21. In that conference, plaintiff confirmed that there was no claim being made for money separately paid "out-of-pocket" by the plaintiff's parents. (The plaintiff's claims were for the past and future reasonable costs for his care, regardless of who paid.) Separating out the payment source could serve no proper purpose. Although the trial court did not recognize the prejudice in the approach IHC was pursuing, it did state that questions related to the parents' out-of-pocket expenses were irrelevant since such a claim had been waived. (TR 620-21) Counsel represented during the bench conference that he was not asking about medical expenses, but then immediately continued in open court asking specifically about the Wilsons' out-of-pocket expenses related to Jared's medical expenses — sending a clear message as to the existence of health insurance.

> Q. Mr. Wilson, isn't it true that in your deposition, in 2003, that you testified that your expenses were minimal?
> A. Yes.
> Q. Okay. And when you were asked if they were around $100, you said, Possibly a little more but not much?
> A. Yes.
> Q. All right. Thank you.
> And that was seven years into Jared's life.
> A. Yes. *Id*. 623:19-624:2.[8]

[8] Obviously the Wilsons had personally paid for a lot more that this. However, they had not kept records and, more importantly, had decided that they wanted to avoid any risk

Clearly, the deposition testimony (which was not admissible, but was discoverable) was referred to for the sole purpose of highlighting the fact that Jared was being cared for through sources other than the Wilsons' personal income.

IHC's improper questioning on October 30th alone was sufficient to prevent Plaintiff from receiving a fair trial, but defendant did not stop there. The following day, defense counsel, in questioning plaintiff's life care expert, Dr. Laura Fox, again made several references to the Wilson's use and reliance on private insurance and governmental programs to pay for various medical expenses. Specifically, counsel asked,

> Q. You have indicated that a gastromy is needed. Jared does not have one now, does he?
> A. No, he does not.
> Q. And if he needs one, do you know how much the parents will have to pay out-of-pocket for that procedure?
> A. That was -- that's included in the life care plan.
> Q. Out-of-pocket. I'm talking about out-of-pocket costs.
> A. I do not put out-of-pocket costs in the lifecare plan.

10/31 Trial Tr. Vol. 5 979:6-17.

At this point the court asked counsel to avoid this subject altogether. *Id*. 979:23-24. Disregarding that instruction, counsel again suggested the availability of collateral sources to the same witness, stating, "I note that you've included costs for a wheelchair replaced every five years. Are you aware that Mr. Wilson testified that there was no cost to the wheelchair Jared used the day he came into court?" *Id*. 980:24-981:4. Again, the court dispassionately asked counsel to stay away from this subject and sustained

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that this very subject could be discussed. Accordingly, no claim was made for the expenses paid personally by the parents.

Plaintiff's objection to this question. *Id*. 981:5-7. The district court, however, did not act with sufficient resolve to make it stop.

Undeterred, counsel's following question again asked about the Wilsons' out-of-pocket expenses. He asked, "For annual equipment and supplies through age 29, your amount as $21,961.69. I don't suppose you know how much the Wilsons would have to pay out-of-pocket for that amount, do you?" *Id*. 981:14-18. Later, counsel again referred to State programs paying for Jared's respite care, *Id*. 985:1-4, and governmental programs (specifically referencing "Medicaid and other federally-assisted programs") that provide much of the care Jared receives. *Id*. 986:10-17. These questions blatantly violated the collateral source rule and plainly prejudiced Plaintiff's rights.

After IHC committed so many violations, it was apparent that no instruction, objection, or attempted explanation on Plaintiff's behalf could undue the prejudicial impact of interjecting evidence of collateral sources into the trial. The proverbial bell could not be unrung, and at that point, plaintiff's counsel unsuccessfully moved for a mistrial. *See* 11/6 Trial Tr. Vol. 9 1614:8-17; 1617:2-15.

That same day, IHC violated the collateral source rule several more times. *See* 11/6 Trial Tr. Vol. 9 1760–1767. Defense counsel first stated, "Were you informed that the plaintiffs have stipulated that there are no out-of-pocket expenses for medical in this case?" *Id*. 1760:7-9. This question elicited a response from Dr. Randle, as expected and objected to, that plaintiffs had relied on Medicaid and insurance to pay past medical expenses. Although counsel purported to "withdraw" the question, the damage was done. *Id*. 1760:21-1761:7, *see also* 1762:10-19. With his final question of Dr. Randle, counsel

specifically asked, "Isn't it true that at age 18 Jared will qualify for Medicaid?" The fact that the objection to this question was sustained was of little consequence.

The references to Medicaid had the same prejudicial harm as the references to insurance. Although the district court recognized that references to Medicaid benefits were improper, over Plaintiff's objection, the Court nonetheless allowed each juror to receive a copy of Dr. Janzen's obviously redacted life care plan to examine during his testimony. Exhibit G, Defendant's Exh. 266; 11/14 Trial Tr. Vol. 14 2787-2788. The plan showed no expenses in categories covered by Medicaid, again drawing to the jury's attention to the fact that Jared Wilsons' expenses were paid by a collateral source. On November 14, 2008, eleven days into the trial, defense counsel made statements confirming his intent to appeal to the very prejudice that the law forbids:

> But what is even more important to me, Your Honor, is this jury has the right to know that if Jared does not get an award, they know that he will not be able to work, and his ability for Medicaid is not based upon his parents' income. That is very important. And the jury has the ability to know that. Because I want them to be able to know that Jared is well taken care of, and that he has this ability. And that he's going to be able to do that if they do not award him a verdict in this case. (TR 2782 emphasis added)

This theme that Jared had not really sustained any financial loss and didn't need the money, was expressed for the seventeenth and final time in closing argument, again over the Wilsons' objection. Referring to Dr. John Janzen, IHC's damage expert (who admitted on cross-examination that Jared is the most severely disabled child that he has seen in his 30-year career), IHC stated:

> This also isn't a case about whether Jared is happy and well taken care of. That's not what this case is about. You've heard the testimony from Dr. Janzen that Jared is doing fine. He's -- he's receiving the care that he

> needs. He's receiving the schooling that he needs. He's getting the therapy he needs. He's getting the hospital and medical care he needs. He has the wheelchair that he needs. He has what he needs. And you have also heard that it's not costing the parents. They're not claiming one cent of out-of-pocket expenses. (TR 3819 to 3820)
>
> [Objection overruled]
>
> They have stipulated there are no out-of-pocket costs. So you don't need to worry about that. This is not what it's about. I'll tell you what this is about. This is about four nurses who are doing the very best that they can.

(TR 3819-3820)

Defense counsel maintained throughout the trial that it was not a violation of the collateral source rule to elicit evidence of what had or had not been paid out of the parents' own pockets. In other words, the bare analysis adopted by the trial court was that as long as the word "insurance" was not used, the defendant was entitled to elicit evidence that someone, other than the parents, had paid Jared's expenses. (*See* infra.) Instead, language reflecting "out-of-pocket expenses" of the parents, or the lack thereof, was substituted for the word "insurance."

Because this argument had some traction with the trial court, in an effort to avoid the issue altogether, the Appellant waived any claim for expenses paid out-of-pocket by his parents. (TR 622-23)

IHC's justifications for this approach varied significantly. It first denied that "out-of-pocket expenses" in any way referred to Jared's medical expenses. (TR 620) Later it claimed that evidence of past insurance benefits is always admissible. (IHC's Mem. in Opp. to Plaintiff's Motion for New Trial, pp. 8, 12, 13, 14, at R 7998-8215)

10. IHC Referenced Genetic Evidence it Could Not Prove in Opening Statement and Referred to Excluded Genetic Evidence in Closing Argument

As part of discovery, IHC was allowed to explore a potential genetic cause for Jared's disabilities. Part of this discovery included having genetic testing performed on Jared. Defense counsel selected the testing and the facility. (TR 519-521; 576-580) All the testing was negative, leaving IHC's genetic defense without basis. Notwithstanding this reality, IHC proceeded to use genetic cause as one of its three main defense themes in opening statement and throughout the trial. (TR 476, 479, 482, 490, 517) In closing, over objection, IHC's counsel was allowed to tell the jury that IHC had such evidence, but the court had excluded it. (TR 3820 to 3821)

11. IHC Interjected Outside Influences in the Courtroom

Knowing that all of the jurors or their families had been patients at the subject hospital, a steady stream of doctors and nurses still dressed in medical attire with their IHC identification badges, sat in the back of the courtroom. (TR 845-848) Defense counsel asked the jury to take note of them. (TR 473-474) Plaintiff, of course, had no way of knowing whether any of these people had treated members of the jury and asked the court to address this problem. The court declined to do so. (TR 845-848)

The jury consisted predominately, if not entirely, of members of the LDS Church. In a pretrial motion, IHC requested the Court to prohibit mention by plaintiff's counsel of his service as an LDS mission president because, "such reference to religious matters is irrelevant and can serve no purpose other than to unfairly prejudice the jury." (*See* Plainitff's Memorandum in Support of New Trial, p. 35, at R 7155-7474). Plaintiff's

counsel agreed. (TR 5985-5988) Unknown to the Court and the plaintiff, defendant was aware, but did not disclose, that IHC's counsel was to be featured in articles in the church section of the Deseret News, as well as the Ensign magazine during the trial. (At least one juror saw the article (see Affidavit of Kent Christensen, at 7369-7371).) Defense counsel, a church leader, also addressed individual jurors by name on numerous occasions. (TR 802; 865; 2334; 3831)

12. IHC Lost Critical Evidence

Dr. MacArthur testified that in accordance with hospital policy, he sent the maternal membrane and a section of the umbilical cord for analysis. However, the maternal membrane (the chorion) never made it to the pathologist for confirmation of Dr. MacArthur's diagnosis of chorioamnionitis. (TR 3061-3062) The pathologist confirmed this irregularity. (TR 3064-3067) The cord section which would have documented the severity of Jared's hypoxia and resulting acidosis also went missing. (TR 2906-2907) Consequently, the first record of Jared's blood gases was from blood which was drawn after 12 minutes of vigorous resuscitation in the delivery room. (TR 1916)[9]

It is against this striking factual backdrop that the specific issues raised in this appeal must be considered.

SUMMARY OF ARGUMENT

In violation of governing rules and law, the defense of this case, in substantial part, was based on prejudicing the jury, depriving the plaintiff of important evidence and

[9] It is worth noting that the cord blood gas results were missing in the *Butterfield* case as well. (TR 3663-3664)

unlawfully turning the Appellant's own doctors into witnesses against him. The trial court failed in its duty to protect Jared and prevent such behavior. Consequently, the jury was subjected to prejudicial evidence and outside influences, his own doctors were improperly turned against him and he was deprived of highly important evidence. Even where he found key evidence, which had been withheld, the court improperly excluded it.

These improper tactics which the court allowed to take place, each individually deprived Jared Wilson of his right to a fair trial, requiring reversal. When viewed cumulatively, they were not only an attack on Jared's claims, but on the integrity of the judicial process, requiring a new trial and additional concrete remedies.

ARGUMENT

I. THE TRIAL COURT COMMITTED HARMFUL ERROR IN REPEATEDLY FAILING TO PROTECT JARED WILSON FROM IHC'S EFFORTS TO PREJUDICE THE JURY WITH COLLATERAL SOURCE EVIDENCE.

There is perhaps no more universally recognized rule in tort trials than that references to insurance (and similar collateral sources) are prejudicial and forbidden. Long ago, the Utah courts recognized that advising the jury that any verdict in favor of the plaintiff would be paid by liability insurance would carry with it a high risk that the jury's determinations of both damages and liability would be prejudiced. *Robinson v. Hreinson*, 409 P.2d 121, 123 (Utah 1965) ("[T]he question of insurance is immaterial and should not be injected into the trial; and that it is the duty of both counsel and the court to guard against it.") For the same reason, evidence that the plaintiff's damages have been, or will be, paid for by insurance or another collateral source is improper. *See Mahana v.*

Onyx Acceptance Corporation, 96 P.3d 893, 901 (Utah 2004); *see also Robinson v. All-Star Delivery, Inc.*, 1999 UT109, ¶23, 992 P.2d 969 (prejudicial effect of admission of evidence that plaintiff had received Social Security disability benefits for prior injuries substantially outweighed the evidence's probative value).

By improperly and inaccurately telling the jury that the Wilsons never paid one cent for Jared's care, IHC hopelessly prejudiced the credibility of plaintiff's case. In light of this evidence, when the Wilsons asked for a multimillion dollar verdict, they must have appeared to the lay jury to be a classic example of greedy parents and lawyers unjustifiably looking to enrich themselves. In fact, what else could the jury conclude, but that Jared was being used as a pawn to allow the Wilsons and their lawyers to be paid for damages that were never incurred? The collateral source rule was designed to avoid this very prejudice.

To avoid any potential problem, plaintiff filed a motion in limine prior to trial addressing this concern. In his supporting memorandum, the plaintiff cited *Mahana*, *supra*, along with *Green v. Denver & Rio Grande Western Railroad Company*, 59 F.3d 1029 (10th Cir. 1995), applying Utah's collateral source rule to evidence of disability benefits. In *Green*, the Tenth Circuit repeated the United States Supreme Court's holding in *Eichel v. New York Central R.R.*, 375 U.S. 253 (1963), where, "the Supreme Court stated that 'the likelihood of misuse by the jury clearly outweighs the value of this evidence' and noted that it had 'recently had occasion to be reminded that evidence of collateral benefits is readily subject to misuse by the jury.'" *Green* at 1033.

Although the trial court granted plaintiff's motion, it never enforced the underlying concept during the trial. Under the trial court's analysis, it simply prohibited defendant from using the word "insurance." However, although the trial court did not allow the use of the word "insurance," it nevertheless allowed IHC to repeatedly convey the prejudicial message . For example:

(TR 981)

14 Q. For annual equipment and supplies through
15 age 29, your amount as $21,961.69.
16 I don't suppose you know how much the
17 Wilsons would have to pay out-of-pocket for that
18 amount, do you?
19 MR. CHRISTENSEN: Your Honor, I think --
20 THE COURT: Please approach.

* * *

24 THE COURT: I don't think this is -- I don't
25 think it's insurance. It's a question of.

(TR 982)

1 MR. CHRISTENSEN: What are the costs?
2 THE COURT: Are there costs that they'd have
3 to pay?
4 MR. DAHLQUIST: That's what I'm asking.
5 MR. CHRISTENSEN: Quit using the term
6 out-of-pocket then.
7 THE COURT: How would it be characterized?
8 MR. CHRISTENSEN: Fair market value.
9 MR. DAHLQUIST: Fair market value is not the
10 issue.
11 MR. CHRISTENSEN: It's the reasonable cost
12 of the services.
13 MR. DAHLQUIST: We can't do that. It's
14 their out-of-pocket.
15 THE COURT: It's the question of what is
16 going to be covered and what do they have to pay.
17 MR. DAHLQUIST: That's right.
18 THE COURT: You can frame it that way. What

19 they would have to pay themselves, personally.

The lower court's failure to safeguard Jared Wilson's rights in this area, coupled with IHC's impunity for the collateral source rule resulted in the very prejudice which the rule was designed to avoid. The trial court did not recognize that IHC was using the phrase "out of pocket expenses" to violate the collateral source rule. Even at the post-trial hearing on plaintiff's motion for a new trial, the court stated:

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14 We didn't hear the defendant challenge the
15 fact that the Court had ruled that there would not be
16 references to insurance and collateral sources.
17 Frankly, the Court and we were ambushed on this issue
18 when counsel got up with the very first witness in
19 the trial, Mr. Wilson, and said, "Isn't it true that
20 you have little or no out-of-pocket expenses?"
21 Initially --
22 THE COURT: Can I interrupt you?
23 MR. CHRISTENSEN: Sure.
24 THE COURT: I've thought about this in
25 length, and let me ask you this question.

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1 It seems like the real discussion of
2 whether is or whether or not out-of-pocket expenses
3 is an oblique or implied reference to insurance. If
4 you had had out-of-pocket expense claims, such as a
5 thousand a year, maybe $10,000, I assume you could
6 have made that claim and the Court would have simply
7 said, "Well, make your claim as to what you claim is
8 out-of-pocket expense, but make no reference to
9 insurance."
10 Would not my ruling have been the same?
11 MR. CHRISTENSEN: No. First of all --
12 THE COURT: If not, then what would we
13 have done?
14 MR. CHRISTENSEN: Trying to search my
15 memory. I don't remember out-of-pocket expenses
16 being an issue, per se, in a trial of this nature.

17 The issue is what were your medical bills? What were
18 the -- what were your medical bills and what was
19 reasonably incurred?
20 It's not how much did you pay out of your
21 pocket and how much did the insurance company pay out
22 of its pocket and how much did Medicaid pay.
23 THE COURT: You mean, people don't have
24 out-of-pocket claims?
25 MR. CHRISTENSEN: Well, they're just

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1 folded into the medical expense claim. They're not
2 separated.
3 In other words, if the medical bills, say,
4 were $100,000, that's what is presented to the jury.
5 It's not 80,000 paid by the insurance carrier, 10 by
6 Medicaid and 10 by the Wilsons.
7 THE COURT: Well, you're assuming that
8 people would not have anything that relates to his
9 care that was not covered by insurance?
10 MR. CHRISTENSEN: No, I'm saying what the
11 jury hears is what are -- what medical expenses have
12 been reasonably incurred and what was their
13 reasonable cost.
. . . .

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. . . .
13 THE COURT: You'd -- you'd wrap them in as
14 medical expenses.
15 MR. CHRISTENSEN: Or care expenses. And
16 the issue would be does he really need this, is this
17 a reasonable cost? It would not use the words
18 "out-of-pocket."
19 Let me see if I can clarify this.
20 If I had asked one of the IHC people or
21 said in opening or closing statement, "Regardless of
22 your verdict, IHC will pay nothing out of pocket in
23 this case," I would be telling them they've got
24 insurance.

The prejudicial impact resulting from evidence demonstrating that a Plaintiff has received benefits from collateral sources has long been recognized by the courts, including the United States Supreme Court. *See, e.g.*, *Eichel v. New York Cent. R.R. Co.*, 375 U.S. 253, 255-256 (1963); *see also Robinson v. All-Star Delivery, Inc.*, 1999 UT109, ¶23, 992 P.2d 969 (*citing Eichel*, 375 U.S. 253). The Supreme Court in *Eichel* was persuaded in part by the specific evidence of the high likelihood of jury misuse that it had witnessed just two months before in *Tipton v. Socony Mobil Oil Co., Inc.*, 375 U.S. 34 (1963). *See Id*. In *Tipton*, the defendant's counsel had emphasized throughout the trial that the plaintiff had a future remedy and had already received workers' compensation benefits. *Tipton*, 375 U.S. at 35-36.

Tellingly, during deliberations regarding the defendant's liability, the jury sent a question to the judge seeking clarification as to the plaintiff's other benefits and future remedies. *Id*. at 36. Although the trial judge quickly instructed the jury to focus only on the question of liability, the Supreme Court found the trial court erred in admitting the evidence and that the error could not be regarded as harmless. *Id*. The Supreme Court disagreed with the Circuit Court's determination that "the prejudicial effect of the evidence of other compensation would be restricted to the issue of damages and would not affect the determination of liability." *Id*. at 37. As stated by the *Tipton* Court, "that suggestion ignores that the evidence was presumably considered without qualification as bearing on a basic fact essential to liability. Indeed the jury's inquiry to the judge seems to indicate that[] . . . the jury was led to place undue emphasis on the availability of compensation benefits in determining the ultimate question of liability." *Id*.

Citing *Eichel* (supra) and *Green* (infra) in *Robinson v. All Star Delivery, Inc.*, 992 P.2d 969 (Utah 1999) this Court reversed a defense jury verdict due to the admission of evidence that the plaintiff had received social security disability benefits. In so holding, this Court held: "Under *Eichel* and the other cases cited above, the prejudicial effect of the evidence outweighs its probative value. Furthermore, such evidence could be too easily used for improper purposes. For example . . . the jury might be more likely to find no liability if they know that plaintiff received some compensation. . . ." (*Id.* at 975-976) In footnote 5, specific reference was made to the collateral source rule. (*Id.* at 976)

The Tenth Circuit has also held that interjecting collateral source evidence into trial is prejudicial, even where the jury does not reach the question of damages. In *Green*, quoted by this Court in *Robinson*, the Tenth Circuit reversed the Utah District Court for allowing the admission of collateral source evidence. *Green*, 59 F.3d at 1034. (*See* also p. 1033.) Relying on several other circuit courts addressing the issue of whether admission of collateral source evidence is harmless where the jury found no liability, the Tenth Circuit stated,

> The major reason for excluding collateral source evidence is the concern that juries will be more likely to find no liability if they know that plaintiff has received some compensation. As the Fifth Circuit stated in *Phillips*, "[t]he jury may feel that awarding damages would overcompensate the plaintiff for his injury ... and may factor this into the liability calculus. This concern compels us to reject [the] suggestion that, even if introduction of post-accident benefits was error, it had no effect on the jury's finding of no negligence and therefore constituted a form of harmless error."

Id. at 1033-1034 (*citing Phillips v. Western Co. of N. America*, 953 F.2d 923, 930 (5th Cir. 1992)). (emphasis added).

Because "the major reason for excluding collateral source evidence is the concern that juries will be more likely to find no liability if they know that plaintiff has received some compensation" (*Robinson* and *Green*, supra), there can be no question the interjection of such evidence on at least 17 different occasions affected and prejudiced the jury's verdict. For this very reason, defendant made it a trial theme to repeatedly suggest that Plaintiff would be taken care of even without a finding of liability. This, coupled with the court's failure to adequately protect Jared from this behavior, tainted the trial and constituted harmful error.

Not only must such error be recognized by this court, but decisive and effective remedies must be granted. As discussed further *infra*, such remedies should include more than just a new trial. In cases involving individuals versus large entities, the huge disparity in financial resources can make it attractive to the corporate defendant to wage a war of attrition. The financial reality is that an individual plaintiff in an expert-intensive case can ill afford a mistrial. On the other hand, in such cases the negative consequences of a mistrial for a corporate defendant are relatively minor. In fact, making the plaintiff start over has its advantages. Allowing a defendant, under such circumstances, to adopt a defense strategy prejudicing the fairness of the trial while only risking a re-trial will not deter, but encourage, the kinds of misconduct at issue in this appeal.

II. THE TRIAL COURT COMMITTED HARMFUL ERROR IN FINDING THE IHC NURSE TRAINING MODULES (OFFERED EXHIBITS 8, 9, 10 AND 36) AUTHENTIC AND RELEVANT, BUT LACKING FOUNDATION.

The threshold, and therefore the most important factual issue of the trial, was expressed in the first question submitted to the jury in the special verdict. That question, which was the only one answered by the jury, read as follows:

> Have plaintiffs proven, by a preponderance of the evidence, that IHC was negligent, in that they violated the applicable standard of care in their treatment of Jared Wilson? (TR 3900)

Accordingly, the results of years of litigation, discovery, preparation, a month-long trial and a lifetime of financial well-being for Jared Wilson turned on this single issue. At the heart of this issue was Nurse Berg's failure to inform Dr. Broadbent of the severe variable decelerations which appeared in Jared's fetal heart tracing at 3:24 and 4:14 on the morning of April 20, along with her failure to advise Nurse Mehew of Dr. Broadbent's instruction that he was to be advised immediately when the anticipated temperature spike occurred. Dr. Broadbent's undisputed testimony was that had he been informed of either of these developments, Jared would have been delivered by C-section by 7:30 am. (TR 2056 to 2059) This was more than an hour before irreversible damage began. (TR 1903-1904) Although Nurse Berg admitted that it was a mistake not to chart the decelerations (TR 903), which mistake she made twice, she claimed that she was not required to notify the physician that they had occurred (TR 756-757). Obviously the jury accepted Nurse Berg's testimony on this critical issue, otherwise they would have answered the special verdict differently.

What the jury did not know was that Berg's conduct was directly contrary to the hospital's own written nursing protocols which required her to **"NOTIFY PHYSICIAN OF PRESENCE OF DECELERATIONS IN FHR TRACING."** (Proposed Ex. 36 p. 10) (emphasis in original). The court found them to be inadmissible even though it found them to be authentic and recognized their relevance. (TR 3451) [10]

Unfortunately, the district court conflated the legal question of foundation with the weight of the evidence. The erroneous nature of this ruling is highlighted by the facts and circumstances surrounding the Wilsons' efforts to discover and use the nursing protocols:

1. On October 31, 2002, plaintiffs requested that IHC "produce all nursing rules, regulations, protocols, and procedures for nurses working in the obstetrical unit of Utah Valley Regional Medical Center." *See* Request No. 2, R366-370.

2. IHC responded on December 12, 2002, stating that it was in the process of obtaining the 1995 records and would produce them as soon as they were found. *See* Response No. 2, R396-401.

3. Again on May 7, 2003, plaintiffs requested IHC "produce all documents, films, photos and other materials used in 1995 for the training of UVRMC nurses …," and "identify … the individual most knowledgeable concerning the training of nurses. ..." See response to Request No. 2, R1183-1184.

[10] Although IHC initially, during the trial, tried to prevent admissibility by claiming ignorance of authenticity, plaintiff had a cover letter signed by trial counsel, JoAnn Carnahan-Bott, in another case (proposed Exhibit 10) authenticating the proposed exhibits. Consequently, these documents were found to be authentic (TR 3451), which left only the issue of relevance.

4. Plaintiffs took the U.R.C.P. 30(b)(6) deposition of Lisa Fullmer on June 17, 2003, who was designated by defendant as the most knowledgeable at IHC regarding the requested documents. Fullmer testified that she remembered training modules "at that time" (referring to 1995) relating to "fetal heart tone monitoring, critical care obstetric[s]," a "recovery module," and "a module on the adolescent patient." Fullmer 06/17/2003 Dep. Tr. 9:1-12:4. She testified that they were on the shelf in her prior office at IHC before her job assignment changed, and that she no longer had possession of them.

5. Again on July 11, 2003, plaintiffs made another discovery request.

6. IHC never produced the responsive documents. Instead, defendant responded by pointing to the deposition of Lisa Fullmer (that had already occurred) and again identified Ms. Fullmer as the person responsible for managing and/or storing the requested policies and procedures, despite the fact that she had already testified that such documents were no longer in her possession.

7. In spite of Fullmer's 30(b)(6) testimony, defendant failed to produce the requested documents. This was true even though the requests for their production continued to be raised during trial and indications were made that they would be (TR 2512).

8. With IHC's repeated failure to produce this critical evidence, plaintiff was required to find it elsewhere. In searching other case files, plaintiff's counsel found proposed trial Exhibits 8, 9, 10, and 36, produced, with a cover letter, by IHC counsel Ms. Carnahan-Bott. While one module is dated as being written in 1997 (Ex. 9), another

module (Ex. 8) is undated, but all of the texts cited in the bibliography of the undated module were published prior to 1995. Ex. 36 is dated October 1993 ("10-93").

9. Plaintiff's expert, Dr. Schifrin reviewed the training modules and testified that the information contained in them was all known in medicine prior to 1995. (TR 1193-1198)

10. To avoid the damning evidence contained in the proposed exhibits, IHC used several approaches. During part of the trial it avoided agreeing to their authenticity. Eventually, defendant acknowledged authenticity, but argued "lack of foundation," a non sequitur. (TR 3447-3451)

The court expressly found the documents to be authentic and acknowledged their relevance, but denied their admission for lack of "adequate foundation" (TR 3451), which was a misconstruction of the law. Absent Rule 403 or privilege issues, admissibility boils down to authenticity and relevance (which is an issue of law). (*Commonwealth v. Brooks*, 508 A.2d 316, 318 (Pa. Super 1986)). Where both are established, it then is the jury's role to consider what weight to give the evidence. In doing so, the jury considers the party's competing assertions of how significant the contents of the document are. Foundation (authentication) need not even be by direct evidence (*Id.* at 319). Referring to both federal and state evidence law, the court said, "We note that the ultimate determination of authenticity is for the jury. A proponent of a document need only present a prima facie case of some evidence of genuineness in order to put the issue of authenticity before the factfinders." (*Id.* at 320) Referring to Federal Rule 901(a), this court stated, ". . . the court is told to admit where a reasonable juror might find for the

proponent on the issue of relevancy. In deciding whether to admit, issues of credibility are decided in favor of the proponent." (*Id.* at 320)

Here, defendant's opposition ultimately centered on the argument that the modules applied to a different unit of the hospital (TR 3450), an assertion contradicted by the modules themselves. Furthermore, good medical practice in one room of the hospital would be good practice in another. In any event, such an argument went to weight, not admissibility. The court misconstrued the law in holding otherwise.

Moreover, this evidence, at the very least, should have been received as secondary evidence. In 2008, at the time of the trial, the best *available* evidence of IHC's 1995 nursing protocols and policies was the proffered modules in plaintiff's possession. Defendant had every opportunity to produce the applicable modules if indeed they were different than those offered, but didn't. Under such circumstances allowing the best available evidence is consistent with the concept addressed in Utah Rules of Evidence 1004, which does not require a party to present original evidence of a writing if the original is lost or has been destroyed.

Even if these modules do not contain the exact policies and procedures in place in 1995, as Dr. Schifrin testified, the medicine related to fetal monitoring did not change significantly in the relevant time frame. This is apparent from the fact that the 1993 and 1997 modules both required the nurse to notify the physician of decelerations. Prohibiting admission of the IHC modules resulted in severe prejudice to the Plaintiff and benefited the defense for losing or withholding evidence.

III. IHC'S REPEATED VIOLATIONS OF THIS COURT'S AND THE COURT OF APPEALS RULINGS HOLDING IN *SORENSEN V. BARBUTO* AND *DEBRY* TAINTED CRITICAL EVIDENCE, PREJUDICED THE TRIAL AND DEPRIVED JARED WILSON OF HIS RIGHT TO HAVE HIS CLAIMS FAIRLY CONSIDERED.

In March 2000, the Utah Court of Appeals made it clear that a "doctor or therapist has an obligation to protect the confidentiality of his patients that transcends any duty he has as a citizen to voluntarily provide information that might be relevant in pending litigation." *See DeBry v. Goates*, 2000 UT App 58, ¶ 28 999 P.2d 582, 587. In 2008, this Court upheld a 2006 Court of Appeals decision in *Sorensen v. Barbuto*, 2008 UT 8, 177 P.3d 614. In affirming the Court of Appeals, this Court held that a physician has a fiduciary duty of confidentiality to his or her patients. Specifically:

> Ex parte communications between a former or current treating physician and counsel opposing the patient in court are prohibited. The information held by a physician that is relevant to a judicial proceeding may be obtained only through traditional methods of discovery. Moreover, a physician must adhere to the healthcare fiduciary duty of confidentiality even when the patient has waived his Rule 506 privilege by placing his physical or mental condition at issue in a judicial proceeding.

Id. at 620. (Emphasis added).

In addition to prohibiting ex parte communications, this Court in *Barbuto* held that "a physician's ability to act as an expert for a patient's antagonist in litigation" is equally limited. *Id*. at n. 1.

The concept of an ethical obligation of confidentiality in the medical field is not new, either in Utah or generally. *See DeBry* at 587; *see also Barbuto* at 620. A good

discussion of the confidentiality inherent in the physician-patient relationship is found in *Harlan v. Lewis*, 141 F.R.D. 107 (E.D. Ark. 1992).

In the present case, there were no more important witnesses than Jared Wilson's own treating physicians. Some (all obstetricians) were named as defendants (Glenn, Broadbent and MacArthur), and had their own separate counsel. Plaintiff, obviously, does not take issue with named parties having representation. However, other treating physicians were never parties and were never threatened with suit. Included in this category were Drs. Minton and Stoddard, the neonatologists that cared for Jared over an extensive period of time after his birth, and Dr. Boyer, who provided care to Jared several years later. All of these doctors had ex parte meetings with IHC's counsel (often more than one meeting) in violation of Utah law.

IHC's Counsel's meeting with Dr. Boyer, who is not an IHC employee, but who was dependent on IHC for virtually all of his income, resulted in Dr. Boyer making very material changes to his interpretation of Jared's brain MRI. Those changes then served as the basis to contest Jared's causation claims, both by Dr. Boyer and defense experts, as well as to contest the opinions of plaintiff's experts. This secret illegal meeting, which was part of a pattern between Ms. Carnahan-Bott and Dr. Boyer in medical malpractice cases involving brain-damaged children, so thoroughly tainted Dr. Boyer that he wrote in what he thought to be a confidential letter to IHC's counsel:

> "I hope my services have been helpful to you and your client. I will await hearing from you regarding any further action in this matter." (emphasis added)

This is precisely the evil that the law as expressed in *DeBry* and *Barbuto* was intended to avoid.

Prior to his ex parte meetings with IHC's counsel, Dr. Minton was prepared to be a key witness for Jared. In fact, this case was filed because of Dr. Minton's statements to Jerrie Wilson, later repeated in the presence of counsel (TR 2618-2623).[11] After meeting ex parte with IHC's counsel, Dr. Minton turned against Jared.

IHC's counsel and Drs. Minton and Stoddard treated this Court's February 2008 *Barbuto* decision with such impunity, that the ex parte meetings with Drs. Minton and Stoddard continued, even during the November 2008 trial (TR 1711, 3154 and 3482). While the violations ultimately resulted in Dr. Minton's exclusion as a defense witness (TR 3154), the fact remains that evidence highly important to Jared Wilson was tainted and he was deprived of it.

Unfortunately, while the trial court excluded Dr. Minton due to *Barbuto* violations, it allowed another equally tainted treating physician, Dr. Stoddard, to take Minton's place, as an adverse expert. Stoddard also had numerous ex parte meetings with IHC's counsel during the trial, including a meeting on November 20, two days after Minton's exclusion (TR 3482 and 3154). Revealingly, when Dr. Stoddard was called as a fact witness early in the trial on November 6, he confirmed that he had never formed an opinion concerning the cause of Jared's brain injuries in the nearly fourteen years that had passed since Jared's birth (TR 1552 to 1553). Nonetheless, after the court excluded

[11] A meeting between the patient's doctor and legal counsel is entirely appropriate. *See Barbuto* at p. 620 footnote 1.

Minton, and after defense counsel again met privately with Stoddard, he had suddenly formed opinions regarding causation. (TR 3469 to 3475). Over plaintiff's repeated objections, Dr. Stoddard attacked Jared's position on causation, going so far as to call it "ludicrous." (TR 3473) It is hard to imagine a more clear violation of this court's ruling precluding a treating physician from acting "as an expert for a patient's antagonist in litigation." *See Barbuto* at ¶ 24, n. 1. This also violated Rule 26 regarding expert witness disclosure (*Pete v. Youngblood*, 2006 UT App 303, 141 P.3d 629 (Utah App. 2006)).

While Appellee will undoubtedly argue that these violations were of no consequence since the jury did not reach the causation issue, that argument ignores reality. In large measure, trials boil down to credibility contests and juries do not neatly compartmentalize credibility. Having Jared's own doctors disparaging his causation claims tainted the trial. The jury was left with the impression that not only were the Wilsons seeking an award of large sums of money for expenses they had never incurred, but that Jared's own treating doctors viewed his claims as "ludicrous."

The ex parte meetings also took crucial witnesses that otherwise would have testified on Jared's behalf and either turned them against him, or at least caused them to be excluded. These taints cannot be undone.

As noted above, through a sham appearance on behalf of Dr. Clark, a non-party, IHC had also prepared another treating physician, Dr. Steven Clark, to be an expert against Jared. Whether Dr. Clark would be allowed to testify was a subject of briefing and hearings during the trial, with the lower court first ruling that he would be excluded (TR 1299-1300) and then reversing itself (TR 2293-2294). Dr. Clark partially mooted

the issue by going to his condominium in Montana, putting himself beyond the reach of a Utah subpoena. However, IHC went to great lengths to gain control of Dr. Clark (while depriving Appellant of access to him).

IHC's repeated violations of *Barbuto* and *DeBry* warrant not only a new trial, but also direction from this court as to the remedies for such misconduct. Excluding the treating physician who has engaged in the unlawful conduct (and/or, like Boyer, actually rewritten his report to accommodate adverse counsel) does not resolve the problem – if anything, it rewards the defendant by successfully eliminating a vital piece of evidence for the patient. (It would be akin to a defendant shredding a key document for the plaintiff, and suffering no consequence other than being unable to use the document itself.) IHC's counsel contacted nearly every treating provider of Plaintiff, all of which occurred after the Court of Appeals' ruling in *DeBry*, and much of it after this Court's ruling in *Barbuto*. As illustrated by this case, absent one or more of the remedies requested in the Conclusion, a patient can essentially be deprived of all treating physicians as witnesses at trial, particularly if IHC is the defendant (as the large majority of physicians in Utah are financially dependent to some extent on IHC).

IV. THE LOWER COURT'S ERRONEOUS EXCLUSION OF DR. HYDE'S TESTIMONY COMPOUNDED THE PREJUDICE FROM THE *DEBRY* AND *BARBUTO* VIOLATIONS.

As previously noted, a claimant faces a difficult task in pursuing injury claims when his own physicians have been aligned against him. (This was particularly true in October and November of 2008 in predominantly Republican Utah County, with the national election campaigns at their apex with Republicans suggesting that the legal

system was flooded with non-meritorious medical malpractice claims.) In an effort to deal with this challenge, plaintiff retained a highly qualified expert, Dr. Fred Hyde, to testify under Rule 608(c) of the Utah Rules of Evidence which provides:

> *Evidence of Bias*. Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced. (emphasis added)

After extensive study and research, Dr. Hyde was prepared to testify to the following facts (TR 5835-5902):

> IHC owns 75% of the staffed hospital beds in Utah County (Hyde I, page 97). (The references to Dr. Hyde's proffered testimony are to his depositions given in this case.). In addition, IHC owns numerous clinics, employs hundreds of doctors and owns the largest health insurer in the state. Moreover, Deseret Mutual Benefits Association ("DMBA"), which insures BYU employees, and other health insurers use IHC's panel of "preferred providers." As a consequence, IHC controls as much as 80% of the practices of Utah County doctors even where they are not IHC employees. (Hyde I, page 107.) The reality of this situation is that doctors and nurses cannot afford to get at cross purposes with IHC. (Hyde I, pages 58-62; 107-110; Hyde II, pages 231-232; 241-249; 266; and 212-214.) All that IHC has to do to literally put a doctor out of business is to keep him off the "preferred provider" list of IHC's health insurance. A doctor cannot lose 80% of his business and survive. (Hyde I, pages 106-110.) That is exactly what happened to Dr. MacArthur (a former defendant in this case). IHC would not put him on their health insurance preferred list. He lost his practice, took out bankruptcy and is now in Ely, Nevada. (*See* MacArthur Deposition, pages 105-109) IHC was not required to give him a reason for its decision and did not do so. (MacArthur Depo, pages 105-109.) For understandable reasons, Utah doctors and nurses have to be very careful not to displease IHC.
>
> The facts that Utah has a "highly concentrated" healthcare market and its effect on physicians are both objectively verifiable based on state and federal studies. (Hyde II, pages 242-246.)

The district court erroneously granted an order *in limine* excluding that evidence, thereby compounding the prejudice to Appellant. (*See* trial court's order excluding (TR

317-318; 3714-3715).) (*See* also Plaintiff's Opposition to Utah Valley Regional Medical Center's Motion to Strike Fred Hyde as Plaintiff's Expert (TR 5835-5902).)

V. THE TRIAL COURT ERRED BY ADMITTING A DECISION BY JUDGE GARY STOTT IN A DIFFERENT CASE COUNTERMANDING THE COURT OF APPEALS DECISION IN *DEBRY*.

As part of IHC's examination of Dr. Boyer, Appellee moved for the admission of a written decision made by Judge Gary Stott of the Fourth District in a different case on April 10, 2000 (TR 2519-2528), Judge Stott's decision, which was issued a month after the Court of Appeals issued its ruling in *DeBry*, is at odds with *DeBry*, which was the reason that IHC wanted the jury to consider it. (TR 2519-2528) Obviously, a district court memorandum decision is not evidence, and the interpretation of *Debry* is an issue of law that is plainly outside of the province of the jury. Nevertheless, over objection, the lower court received it into evidence, and it was given to the jury. This ruling at best was confusing and at worst legitimized the improper ex parte meetings by Jared's own doctors with defense counsel. This also illustrates the trial court's own uncertainty in dealing with the application of *Barbuto* in this case.

VI. THE CUMULATIVE EFFECT OF THE NUMEROUS ERRORS BY THE TRIAL COURT AND THE REPEATED MISCONDUCT BY DEFENSE COUNSEL WAS TO DEPRIVE JARED WILSON OF HIS RIGHT TO A FAIR TRIAL.

Reversal is appropriate where "'the cumulative effect of the several errors undermines our confidence ... that a fair trial was had.'" *Utah Chapter of Sierra Club v. Air Quality Bd.*, ___ P.3d ___ , 2009 UT 76, ¶ 54 (*quoting State v. Kohl*, 2000 UT 35, ¶ 25, 999 P.2d 7)(internal quotations omitted). In this case, the cumulative effect of the

trial court's errors and defense counsel's violations of the collateral source and *Barbuto* rules, and other violations, establish that Jared Wilson was deprived of his right to a fair trial, warranting reversal and a new trial.

This Court's holding in *Whitehead v. American Motors Sales Corp.*, 801 P.2d 920, 928 (Utah 1990) is instructive on the application of the cumulative error doctrine in this case at bar. In *Whitehead*, this Court held that cumulative error in the trial court proceedings warranted reversal of the jury's verdict and a new trial. The issue dealt with the trial court's exclusion of certain evidence the defendant manufacturer sought to present regarding crashworthiness, and the trial court's limitation of the defendant's cross-examination of the plaintiff's expert witness. This Court ruled that reversal was appropriate, because, "[g]iven the conflicting testimony presented on this key issue, we cannot say that the substantial rights of defendants were not affected by the combined effects of the erroneous exclusion of the evidence and the limitation of cross-examination." *Id.* at 928.

Here, the numerous errors committed by the court during the trial on key issues, including collateral source, standard of care, and *Barbuto*, as set forth herein, coupled with the deliberate efforts by the defense to prejudice the jury, certainly undermine confidence in the fairness of this trial. Accordingly, the verdict should be reversed and a new trial ordered.

VII. THE TRIAL COURT ERRED IN AWARDING COSTS AGAINST JARED WILSON.

The Rules of Civil Procedure 54(d)(2) are unambiguous in requiring that a Bill of Costs must be filed within five days of the entry of judgment. After the November 21, 2008 verdict, Appellee prepared an "Order," which was signed by the court on December 9 referencing that trial and verdict "entering judgment consistent therewith," and concluding "wherefore it is hereby ordered, adjudged and decreed that plaintiff's complaint and all claims set forth therein are hereby dismissed with prejudice." (TR 7832)

IHC's Bill of Costs was not filed until December 26, 2008. (TR 7592)

In an attempt to remedy this situation, IHC submitted another pleading entitled "Judgment," which was signed by the court on January 8, 2009. (TR 7721) It then argued that its Bill of Costs was timely. This question was briefed with the court ruling in favor of Appellee.

Form should not rule over substance. Regardless of the label, the "order" signed by the court on December 9, 2008, was a judgment on the merits, which triggered the five-day deadline. Accordingly, IHC's Bill of Costs was untimely and a cost judgment should not have been rendered against Jared Wilson.

CONCLUSION

It is respectfully submitted that the judgment against Appellant be reversed, that he be granted a new trial and that the following additional relief be given:

(a) Striking IHC's defense on the causation issue (as the key witnesses on this question cannot be untainted);

(b) In the alternative, the use of Dr. Boyer's post-ex parte meeting change in Jared's medical record be precluded and that Drs. Boyer, Minton, Stoddard, and Clark be precluded from giving any opinions regarding the cause of Jared Wilson's disabilities. Moreover, to the extent IHC's retained expert witnesses rely on the tainted "fruit of the poisonous tree," such causation evidence should be similarly excluded;

(c) Attorneys who have had ex parte meetings with an opposing party's doctor in knowing violation of this court's decision in *Barbuto* should be precluded from continuing as adverse counsel and from passing on information or insights improperly obtained to new counsel;

(d) Finally, where a party with vastly superior financial resources has intentionally and repeatedly violated the collateral source rule and/or this court's (or the Court of Appeals) rulings in the *Barbuto* decisions, thereby necessitating a new trial, that party should be required to pay an amount representing the value of the costs, expenses and attorneys fees necessitated by having to re-try the case.

DATED this 11th day of February, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of **APPELLANT'S BRIEF** was mailed to the following this 11th day of February, 2010:

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APPENDIX

1. Plaintiff's Motion in Limine Regarding Health Insurance
2. Court's Order Regarding Plaintiff's Motion in Limine Regarding Health Insurance
3. Nurse Training Modules – Exhibits 8, 9, 10 and 36
4. Court's Final Order dated December 9, 2008
5. Judgment on the Verdict dated January 8, 2009
6. Court's Order Denying Motion for New Trial dated May 21, 2009