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Jerome Wilson, Leilani Wilson, Jared Tanner  
Wilson v. C. Joseph Glenn, M.D., Steven S.  
MacArthur, M.D., David H. Broadbent, M.D., IHC  
Hospitals, Inc., Utah Valley Regional Medical  
Center : Reply Brief

Utah Court of Appeals

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Steven C. Bednar, JoAnn E. Bott, Sammi V. Anderson; Manning, Curtis, Bradshaw & Bednar; Charles H. Dahlquist, David J. Hardy, Merrill F. Nelson; Kirton & McConkie; attorneys for appellee. Roger P. Christensen, Scott T. Evans; Christensen & Jensen; Joseph W. Steele; Steele & Biggs; attorneys for appellants.

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**IN THE UTAH SUPREME COURT**

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JEROME WILSON and LEILANI  
WILSON, as Guardians ad Litem for  
JARED TANNER WILSON, their minor  
child,

Plaintiff/Appellant and  
Cross-Appellees,

vs.

C. JOSEPH GLENN, M.D., STEVEN S.  
MacARTHUR, M.D., DAVID H.  
BROADBENT, M.D., and IHC  
HOSPITALS, INC., dba UTAH VALLEY  
REGIONAL MEDICAL CENTER,

Defendant/Appellee and  
Cross-Appellant.

---

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  
District Court Case No. 010404519

---

**REPLY BRIEF OF APPELLANTS AND  
BRIEF OF CROSS-APPELLEE**

---

FILED  
UTAH APPELLATE COURTS  
JUN 14 2010

Roger P. Christensen, No. 0648  
Scott T. Evans, No. 6218  
CHRISTENSEN & JENSEN, P.C.  
15 West South Temple, Suite 800  
Salt Lake City, Utah 84101

Joseph W. Steele, #9697  
STEELE & BIGGS  
5664 Green Street  
Salt Lake City, Utah 84123  
*Attorneys for Plaintiffs/Appellants  
and Cross-Appellees*

Steven C. Bednar  
JoAnn E. Bott  
Sammi V. Anderson  
MANNING, CURTIS, BRADSHAW & BEDNAR  
170 S Main Street, Suite 900  
Salt Lake City, UT 84101

Charles H. Dahlquist  
David J. Hardy  
Merrill F. Nelson  
KIRTON & McCONKIE  
60 East South Temple, Suite 1800  
Salt Lake City, UT 84111  
*Attorneys for Defendant/Appellee and  
Cross-Appellant IHC Hospitals, Inc. dba  
Utah Valley Regional Medical Center*

Roger P. Christensen, No. 0648  
[roger.christensen@chrisjen.com](mailto:roger.christensen@chrisjen.com)  
Scott T. Evans, No. 6218  
[Scott.Evans@chrisjen.com](mailto:Scott.Evans@chrisjen.com)  
CHRISTENSEN & JENSEN, P.C.  
15 West South Temple, Suite 800  
Salt Lake City, Utah 84101  
Telephone: (801) 323-5000

FILED  
UTAH APPELLATE COURTS  
JUN 17 2010

Joseph W. Steele, No. 9697  
[jwsteele5@att.net](mailto:jwsteele5@att.net)  
STEELE & BIGGS  
5664 Green Street  
Salt Lake City, Utah 84123  
Telephone: (801) 266-0999  
*Attorneys for Plaintiff/Appellant*

**IN THE UTAH SUPREME COURT**

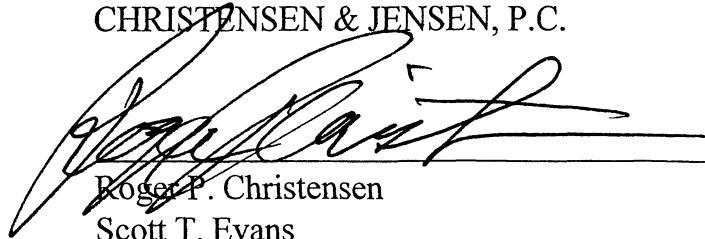
<p>JEROME WILSON and LEILANI WILSON, as Guardians ad Litem for JARED TANNER WILSON, their minor child,</p> <p>Plaintiff/Appellant,</p> <p>vs.</p> <p>IHC HOSPITALS, INC.,</p> <p>Defendant/Appellee.</p>	<p><b>ERRATA</b></p> <p>Appellate Case No. 20090354 - SC</p> <p>Fourth District Court Civil No. 010404519</p>
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The Reply Brief of Appellants filed June 14, 2010 inadvertently had the wrong title for Argument subsection III.C. The correct heading in the Table of Contents and on page 19 should read:

**C. Appellant Did Not Waive the *Barbuto* Violations.**

DATED this 15<sup>th</sup> day of June, 2010.

CHRISTENSEN & JENSEN, P.C.



Roger P. Christensen  
Scott T. Evans  
*Attorneys for Plaintiff/Appellant*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of **ERRATA** was mailed to the following this 15<sup>th</sup> day of June, 2010:

Steven C. Bednar  
JoAnn E. Bott  
Sammi V. Anderson  
MANNING, CURTIS, BRADSHAW &  
BEDNAR  
170 S Main Street, Suite 900  
Salt Lake City, UT 84101  
*Counsel for IHC Hospitals, Inc. dba  
Utah Valley Regional Medical Center*

Charles H. Dahlquist  
Merrill F. Nelson  
Matthew C. Ballard  
KIRTON & McCONKIE  
60 East South Temple, Suite 1800  
Salt Lake City, UT 84111  
*Counsel for Intermountain Health  
Services, Inc.*



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Roger P. Christensen, No. 0648  
Scott T. Evans, No. 6218  
CHRISTENSEN & JENSEN, P.C.  
15 West South Temple, Suite 800  
Salt Lake City, Utah 84101

Joseph W. Steele, #9697  
STEELE & BIGGS  
5664 Green Street  
Salt Lake City, Utah 84123  
*Attorneys for Plaintiffs/Appellants  
and Cross-Appellees*

Steven C. Bednar  
JoAnn E. Bott  
Sammi V. Anderson  
MANNING, CURTIS, BRADSHAW & BEDNAR  
170 S Main Street, Suite 900  
Salt Lake City, UT 84101

Charles H. Dahlquist  
David J. Hardy  
Merrill F. Nelson  
KIRTON & McCONKIE  
60 East South Temple, Suite 1800  
Salt Lake City, UT 84111  
*Attorneys for Defendant/Appellee and  
Cross-Appellant IHC Hospitals, Inc. dba  
Utah Valley Regional Medical Center*

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## ARGUMENT

### **I. JARED WILSON NEITHER AGREED TO NOR WAIVED IHC'S VIOLATIONS OF THE COLLATERAL SOURCE RULE.**

As often occurs when a party seeks to maintain an unsupportable position, IHC's alleged justifications for its repeated violations of the collateral source rule continue to change. Initially, IHC claimed that it was not referring to medical expenses (R 0620). Subsequently, it claimed that the jury had a right to know that Jared would be taken care of even if they did not award him a verdict (R 2782:15-24). Later, it claimed that "evidence relating to insurance benefits received in the past is always admissible . . ." (R. 8203 (Utah Valley Regional Medical Center's Memorandum in Opposition to Plaintiff's Motion for New Trial, p. 8.)) Then, for the first time, IHC claimed in oral argument on Plaintiff's Motion for New Trial that it was the plaintiff, not the defendant, who wanted to present evidence of insurance covering Jared Wilson (R 8622, April 20, 2009 hearing on Motion for New Trial, p. 41).<sup>1</sup> Now, for the first time, IHC contends in its brief before this court that Jared agreed to the, "exact structure and procedures followed during the trial with respect to collateral source references." (*See Appellee's Brief*, p. 20.)

It is certainly telling that there have been approximately 20 occasions since this agreement was allegedly reached on the second day of trial, where Respondent's

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<sup>1</sup> "We didn't put on any evidence of insurance. We didn't put on any evidence of Medicaid or Medicare in the future, no evidence of anything was there. . ." (p. 41.) It was the plaintiff who continued to want to get the evidence of insurance into the record in spite of it being their motion that the insurance not be entered. *Id.* Counsel also referred to the 17 different references to the lack of out-of-pocket expenses as "minimal." (pp. 40-41.)

collateral source rule violations have been raised by Wilson and yet this is the first time that the existence of an alleged agreement has been claimed by IHC.

In light of this new allegation, a review of what actually occurred may be helpful. On September 5, 2008, the plaintiff filed a motion in limine seeking to preclude IHC from introducing evidence or making statements suggesting or implying the existence of insurance coverage for payment of past, present, or future health care costs under the collateral source rule. (R 5414-5419.) That motion was granted at a pre-trial conference held on October 23, 2008. (Hearing Transcript, p. 23.) Nevertheless, during IHC's cross examination of the first trial witness, Jerome Wilson, the following occurred:

Q: Now, we have your medical expenses, but we don't have the amount that you paid for out of pocket expenses. So I'm going to ask you some specific questions.

And that is, I notice that Jared had a wheelchair as he came in here today?

A: Yes.

Q: And it was a special wheelchair?

A: Yes.

Q: How much of that did you pay out of your pocket?

A: None. We have both --

MR. CHRISTENSEN: Your honor, I'm going to object to this as a direct violation of the court's order.

(WHEREUPON THE FOLLOWING WAS HEARD AT THE BENCH, OUTSIDE OF THE HEARING OF THE JURY.)

THE COURT: Just let me ask you a question. Did you have a stipulation about the medical expenses?

MR. DAHLQUIST: Its not the medical expenses that I'm asking about.

THE COURT: About the out-of-pocket.

MR. DAHLQUIST: I'm asking the out-of-pocket.

THE COURT: I understood. What's the arrangement regarding the expenses?

MR. CHRISTENSEN: You've ruled that --

THE COURT: Let me ask you this. How do you intend to enter them? What do you intend?

MR. CHRISTENSEN: We're still working with them on the stipulation.

MR. DAHLQUIST: We haven't -- we haven't had any. We've asked them for out-of-pocket expenses.

MR. CHRISTENSEN: We still don't have them. And I have the --

THE COURT: Are you intending to offer a different witness?

MR. CHRISTENSEN: Well, he is, I think, misunderstanding the question. And that may be --

THE COURT: Let me ask you this.

MR. DAHLQUIST: I think Roger is right. His objection is the insurance issue, and we couldn't agree more. I agree with that.

THE COURT: I guess the question I still don't understand is, what witness are you going to use to enter out-of-pocket expenses?

MR. CHRISTENSEN: We're not claiming out-of-pockets. We haven't kept records, and so we're not claiming them.

THE COURT: Then I think it's irrelevant.

(R 8605, Tr. pp. 0619-0621.) (emphasis added)

Nevertheless, IHC continued with that witness, as well as on numerous other occasions outlined in Appellant's Brief to circumvent the collateral source rule.

In light of the fact that an order in limine had been issued barring suggestions or implications of insurance, both the court and Jared's counsel were ambushed by this approach. Counsel then immediately drove the point, i.e. the existence of health insurance, home again. (R 8605, Tr. pp. 0623-0624.) (*See also* Appellant's Brief, pp. 17-22.)

Under these circumstances, *i.e.*, this was Jared's father and the first witness of the trial, a clear message was sent, more than once, that the Wilsons had insurance, with the jury watching a bench conference that could only have served to highlight the message.

The plaintiff was then on the horns of a dilemma. The jury knew that Jared had a multi-million dollar damage claim, but had just seen Jared's father seemingly admit that there were no past economic damages. Accordingly, Jared's counsel was forced to choose between two prejudicial choices: Either have the jury believe that the Wilsons and their counsel were dishonest and were attempting to mislead the jury into giving them a huge verdict for unsustained damages (a fatal prejudice in any case), or to change course and offer evidence to explain this apparent critical discrepancy. Having relied in good faith on the court's order and the expectation of compliance by IHC, Jared was irreparably placed in the position of being caught in a seeming lie. By IHC's violation of the rules, Jared was forced to choose between two evils. The lesser of the two was to explain the discrepancy. Consequently, on redirect the following occurred:

Q. I think we need to clarify an area. You were asked about out-of-pocket expenses. Have the bulk of Jared's medical expenses been paid by health insurance or Medicaid?

A. Yes.

Q. And is it your understanding --

THE COURT: Just a minute, Mr. Christensen. If you'll approach please.

*(WHEREUPON THE FOLLOWING WAS HEARD AT THE BENCH, OUTSIDE OF THE HEARING OF THE JURY.)*

THE COURT: Don't we have an order about excluding references to insurance?

MR. CHRISTENSEN: Well, we have got to go into it now.

MR. DAHLQUIST: That was your offer.

MR. CHRISTENSEN: We've got to go into it now.

MR. DAHLQUIST: We've got a ruling.

MR. CHRISTENSEN: He's created a false impression that --

MR. DAHLQUIST: Oh, heaven.

THE COURT: No, I --

MR. DAHLQUIST: And you've agreed to it. I think we need to keep that out.

MR. CHRISTENSEN: We've got -- we have --

MR. DAHLQUIST: I think it violates the order.

MR. CHRISTENSEN: It is not. He's created the false impression now that they don't have -- there's not a financial issue here.

. . . .

MR. CHRISTENSEN: They need to know now that there are lien interests in this, in part because there --

THE COURT: There are what?

MR. CHRISTENSEN: There are lien interests for the records [sic] that have been paid. And those notices have been given. Those are part of the --

THE COURT: No, I'm not going to allow that. No.

MR. DAHLQUIST: Okay.

THE COURT: Okay.

(R 8605, Tr. pp. 0652-0654.)

A few minutes later the jury was excluded and an additional record was made. As part of that conference, Jared's counsel explained (R 8605, Tr. p. 0657):

And this is the problem. The false impression has now been created to this jury that the Wilson's, and particularly Jared, are on a free ride without expense. That is not true. By law, Medicaid has a lien, and so does Blue Cross, and any other health insurer on this recovery.

Counsel explained that the plaintiff was probably now going to have to call the Medicaid people and the Blue Cross people to give testimony concerning their liens. The court then made the observation that, "the false impression is going to be resolved with the presence of that evidence." (R 8605, Tr. p. 0659.) In response, Jared's counsel

stated, “that’s fine. If we can present it through the Blue Cross and Medicaid people, then that’s fine.” (R 8605, Tr. p. 0659.)<sup>2</sup>

What IHC is now claiming to have been an agreement by the plaintiff to IHC’s violation of the collateral source rule was in fact Jared’s attempt to deal with the mess that had been created by IHC’s repeated violations of the collateral source rule and the order in limine, as well as the trial court’s erroneous ruling allowing the prejudice that had occurred. The proverbial bell had been rung; it could not be unringed, and Jared had been prejudiced. This was simply counsel’s effort, on the fly, to try to contain the prejudice. Even then, the court ruled that it would not allow Mr. Wilson to explain the misleading impression that had been created for the jury. (R 8605, Tr. p. 0661.)

In direct contradiction of IHC’s current assertion that Jared agreed to its violation of the collateral source rule and order in limine on the second day of trial, plaintiff continued objecting to such violation throughout the trial up to and including closing arguments. (*See Appellant’s Brief*, pp. 19-22.) Furthermore, as IHC’s prejudicial actions continued, Jared’s counsel was compelled to move for a mistrial. (R 8611, Tr. p.1613-

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<sup>2</sup> Clearly counsel was not saying that what had occurred was “fine,” but was simply acknowledging the court’s direction as to how such evidence should be presented. Subsequently, the trial court obviated the need for calling the lienholders as live witnesses by instructing the jury that liens existed (R 8621, Tr. p. 3761-3762), but such instruction could not rectify the damage already done, and the whole issue of insurance, lienholders, etc., would never have been presented to the jury but for IHC’s violation of the pretrial order.

1648.) On none of these occasions did Respondent assert that there had been an agreement by the Appellant for what was occurring.<sup>3</sup>

Where a party has acted timely to exclude improper evidence (by motion in limine or objection), that party does not waive its appellate rights or agree to the improper admission of the evidence, by its subsequent efforts to address the prejudicial evidence. (*State of Utah v. Saunders*, 992 P.2d 951 (Utah 1999).)

In *Saunders* the defendant had made a pre-trial motion in limine asking the trial court to exclude evidence of the defendant's misconduct in 1991. That motion was denied and the prosecution raised the alleged 1991 misconduct at trial. On direct examination, Saunders discussed the evidence he had previously attempted to exclude. On appeal, the prosecution argued that he had waived his position and had "opened the door." In rendering its decision, this Court held:

Saunders clearly was entitled, indeed required as a practical matter, to rebut or explain that evidence by his testimony. To say that defendant "opened the door" and therefore was responsible for the admission of the 1991 evidence, as the state contends, is patently incorrect. The trial court and the Court of Appeals both fell into palpable error in so ruling.

*Id.* at 958.

This court also explained:

A defendant need not forego rebutting improperly admitted evidence to preserve his objection to that evidence. In *State v. Span*, this Court stated,

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<sup>3</sup> The trial court's comments at the hearing on the Motion for New Trial (R 8622) certainly do not support the notion that there was an agreement referring to the collateral source rule violation issue. The court said "And I've concluded that I don't like it and I don't like what's happened but -- this might be a matter of criticism by the appellate court. . ." (p. 78.) The court also acknowledged that it was "caught off guard" by the references to out-of-pocket expenses and the potential implications of insurance. (p. 78.)



“it would be unfair for a prosecutor to question the witness on prohibited information or issues, but then require the defendant to forego cross-examination, which would ameliorate the damage caused, to preserve an objection to the prosecutor’s misconduct.” (citation omitted)

*Id.* at 959.

*Saunders* is consistent with the decisions from other jurisdictions in civil cases. *Mary M. v. City of Los Angeles*, 814 P.2d 1341, 1346 (Cal. 1991) (“an attorney who submits to the authority of an erroneous, adverse ruling, after making appropriate objections or motions, does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible”); *McCathern v. Toyota Motor Corporation*, 23 P.3d 320, 327 (Or. 2001) (“A party has the right to meet its opponent’s evidence admitted under the trial court’s ruling. After making the proper objections, a party may counter its opponents evidence, whether correctly admitted or not, without waiving its evidentiary objection on appeal.”); *Scurlock Oil Co. v. Smithwick*, 724 SW.2d 1, 4 (Tex. 1986) (“Having properly objected, [a party is] not required to sit idly by and take its chances on appeal or retrial when incompetent evidence [is] admitted. . . [a party is] entitled to defendant’s help by explaining, rebutting or demonstrating the untruthfulness of objectionable evidence without waiving its objection.”); *Stong v. Freeman Truckline Inc.*, 456 So.2d 698, 711 (Miss. 1984) (“[W]here a party requests a correct instruction only to have it refused by the trial judge, that party does not, by requesting another instruction, bowing to the judge’s ruling, waive the right to assign his error on appeal of the refusal of the correct instruction. . . . and, when the litigant reaches this Court, we will not imply a waiver from

the subsequent conduct which does nothing more than show the lawyer's obligatory respect for the trial judge while at the same time continuing as best can be done the advancement of his client's case.'').

Jared Wilson acted both by a pre-trial motion in limine and by trial objections to keep the jury from hearing evidence informing the jury that Jared's medical expenses had largely been paid by collateral sources. However, once IHC acted improperly in introducing such evidence and the court erroneously allowed this to occur, Jared did not waive his appellate rights on this issue nor agree to the introduction of such evidence. In the words of this Court in *Saunders*, "It would be unfair for a[n] [opposing attorney] to question the witness on prohibited information or issues, but then require the [opposing party] to forego cross-examination, which could ameliorate the damage caused, to preserve an objection to the [opposing counsel's] misconduct."

In the final analysis, this issue is simple and straightforward: Any alternative explanations notwithstanding, IHC made the existence of collateral sources a repeated theme at trial because it knew that by doing so, the jury would be less likely to render a verdict against it. (*See* R 2782 and 3819-3820.) It is for this very reason that such evidence has long been recognized as prejudicial and forbidden. Having succeeded in this strategy, in spite of the plaintiff's best efforts to avoid the prejudice, it must now accept the consequences on this appeal.

**II. A PARTY CANNOT AVOID AUTHENTICATED RELEVANT ADVERSE EVIDENCE BY DENYING THAT IT EXISTS – IT WAS ERROR FOR THE TRIAL COURT TO ALLOW APPELLEE TO DO SO.**

The plaintiff's efforts to obtain the nursing modules throughout discovery and trial are reviewed in Appellant's Brief (pp. 33-37) and will not be repeated here. By way of summary, however, during discovery IHC designated its employee, Nurse Lisa Fullmer, under Rule 30(b)(6) regarding the nurse training modules applicable in 1995. Fullmer testified that she remembered such training modules (referring to 1995) relating to fetal heart tone monitoring, and that they were on a shelf in her prior office at IHC when her job assignment changed (Appellant's Brief, p. 35). That testimony is entirely consistent with proposed Exhibit 36 dated October 1993. Although Ms. Fullmer was still working in a responsible position at IHC, just before trial IHC asked the court to excuse her from testifying at trial, claiming, among other things, that she had "physical and mental disabilities including reduced cognition and acute memory loss." (Oct. 23, 2008 Hearing, pp. 185-194.) In support of this request, Appellee submitted letters from IHC doctors (*Id.*, p. 192).<sup>4</sup>

Now IHC cites Fullmer's self-serving trial testimony as conclusively trumping her deposition testimony and Exhibit 36 itself (dated October 1993), which on its face states that it is applicable to Utah Valley Regional Medical Center. (R 6437-6443.)

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<sup>4</sup> Although a transcript of the October 23, 2008, pretrial conference was ordered (R 8579-8580) and prepared by the court reporter, it appears to be missing from the Fourth District Court's record. A motion to supplement the record with a copy of the transcript has been filed simultaneously herewith.

At the end of footnote 18 of its brief, IHC asserts that the plaintiff never moved for the admission of proposed Exhibit 36. However, asking the court to admit Exhibit 36, along with Exhibits 8, 9 and 10, was the whole purpose of the hearing on November 20, 2008 (R 3446-3451). At that hearing, Exhibit 36 was referred to repeatedly. On page 3451 the court stated, “could I look at 36?” After looking at it, the court asked counsel if they submitted the issue, whereupon it stated, “I’m persuaded they are authentic. I’m unpersuaded there is adequate foundation.” Immediately thereafter the court said, “Respectfully, they are not received.” (TR 3451.) IHC’s counsel certainly understood that she was opposing the admission of Exhibit 36 (R 3450).<sup>5</sup>

Jared Wilson more than met the requirements for foundation and relevance, and no Rule 403 issue was raised. Accordingly, as was pointed out at the November 20 hearing, IHC’s arguments went to weight, not admissibility (R 3450), and the jury should have been given this critical evidence. Excluding it was an error of law.

### **III. APPELLEE MISCONSTRUES BOTH *BARBUTO* AND APPLICABLE LAW REGARDING A PHYSICIAN’S DUTIES OF CONFIDENTIALITY TO HIS PATIENT.**

On August 10, 2006, the Utah Court of Appeals issued its decision in *Sorensen v. Barbuto*, 2006 UT App 340, 143 P.3d 295 (“*Barbuto I*”). The opinion stated that, “consistent with the reasoning of *DeBry*, we hold that ex parte communication between a

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<sup>5</sup> In its brief, IHC also asserts that as of 1995 the nurse training on fetal heart monitoring was done by training videos that had been produced to the Wilsons (Appellee’s Brief, p. 17). In truth, the videos produced were not fetal heart monitor nurse training modules, but irrelevant videos on the use of certain machines (not involved in this case), along with a videotape of a presentation by Dr. Minton. (R 1187-1191.)

physician and opposing counsel constitutes a breach of the physician's fiduciary duty of confidentiality." *Id.* at 300. "[I]n addition, the prohibition extends beyond the termination of medical treatment and applies with equal force to a plaintiff's current and former treating doctors." *Id.* Noting that patients cannot be assured that their rights will be adequately protected without notice, *Barbuto I* required the use of court-authorized discovery methods, rather than ex parte contact with the patient's adversary. *Id.* at 301.

On February 1, 2008, this Court affirmed *Barbuto I* in *Sorensen v. Barbuto*, 177 P.3d 614 (Utah 2008) ("*Barbuto II*"). In rejecting a contention that *Barbuto I* had imposed some new fiduciary duty upon physicians, this court found that the duty recognized in *Barbuto I* was not new. On the contrary,

[a] physician's duty of confidentiality encompasses the broad principle that prohibits a physician from disclosing information received through the physician-patient relationship. The duty is rooted in the ethical underpinnings of this relationship and serves to prevent a physician from disclosing sensitive medical information to any third party. It arises from the understanding that good medical care requires a patient's trust and confidence that disclosures to physicians will be used solely for the patient's welfare and that a patient's privacy with regard to those disclosures will be respected and protected.

*Id.* 617.

The *Barbuto* court was not insensitive to the legitimate need for confidential medical information in litigation. "Making this information available through formal methods of discovery strikes a balance between enabling the patient to protect confidential medical information that has no relevance to the civil action and providing the patient's adversary access to information that is relevant to a condition placed at issue in the case," the Court observed. *Id.* at 620.

“[W]e agree that ex parte communications between a treating physician and counsel opposing the patient should be prohibited because such communications are destructive to the relationship that exists between a physician and a patient,” the Court concluded. *Id.* *Barbuto II* also expressly barred attorneys from participating in such ex parte communications. *Id.* at 621.

In light of the clear prohibition in *Barbuto I and II*, it is both puzzling and concerning that IHC’s counsel, after August 10, 2006, and even up through trial, would conduct ex parte meetings with Jared Wilson’s doctors without notice to Jared (through counsel), and without seeking direction from the court. IHC’s suggestion that Jared’s failure to anticipate and prevent its disregard of *Barbuto* constituted a waiver has no basis in law or public policy. Moreover, the undisputed evidence in this case is that even after Jared’s attorneys realized, during the trial, that such meetings were taking place; and even after strenuous objections were made to the court; and even after the court had sanctioned IHC for such meetings, they continued.<sup>6</sup>

**A. There is no blanket “employee” exception to *Barbuto*.**

As noted above, the prohibition against ex parte meetings between a patient’s doctor and the patient’s adversary is based on the sanctity of the patient / physician relationship. Suggesting that this fundamental concern may be disregarded whenever an employer / employee relationship exists does not square with the principles underlying

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<sup>6</sup> After Dr. Minton was excluded due to the ex parte meetings, counsel began having them with his partner, Dr. Stoddard, preparing him to take Dr. Minton’s place as an adverse expert witness against his own patient. (R 3154, 3482.)

the *Barbuto* decisions. Sound public policy requires an organization's business model and policies to comport with the law, not the other way around.

IHC would have Utah law in this context view a physician-employee no differently than a parking services employee, a maintenance engineer, a collections manager, or any other employee. IHC's contention would eviscerate the *Barbuto* protections in the medical malpractice context.

The practice of medicine, like the practice of law, is a profession requiring the utmost duties of loyalty and confidentiality to the patient. Practitioners involved in those few professions which have such duties are held to different legal requirements than other members of the working public. For many years a number of states, like California, have followed the "corporate practice doctrine" precluding the corporate practice of law or medicine. (See Survey of State Laws Relating to the Corporate Practice of Medicine, D. Cameron Dobbins, 1997.) The 2002 decision of the California Court of Appeals in *Gafcon, Inc. v. Ponsor & Associates*, 98 Cal App. 4th 1388, 120 Cal Rptr.2d 392 contains a good historical discussion of the corporate practice doctrine, in California and other states. While *Gafcon* is not on point for this issues of this appeal, its discussion of the unique status of members of, "a profession requiring the utmost duties of loyalty and confidentiality" to client/patients and the need to prevent corporate employers from interfering with such duties, is highly applicable to the matters at issue.

*Gafcon* dealt with a situation where all of the members of a law firm were salaried employees of Travelers Insurance. With the Court finding that the "law firm was a unit of Travelers Indemnity Companies staff counsel organization and its lawyers were

Travelers employees.” *Id.* at 1398. The *Gafcon* court, noting that there had been some exceptions recognized to the corporate practice doctrine which allowed a liability insurance carrier to assign one of its employee/attorneys to represent the insured provided: (1) there was no conflict of interest; (2) the attorneys must be certain that the insurance company does not control or interfere with the exercise of professional judgment in representing insureds; (3) the insurance company cannot receive any attorneys fees; and (4) the firm name used by in-house counsel is not false, deceptive or misleading. *Id.* at p. 1413. *See also* 1406. The court also held:

It is a well accepted and oft repeated principle that the attorney retained by the insurance company for the purpose of defending the insured under the insurance policy owes the same duties to the insured as if the insured had hired the attorney him or herself. (citations omitted)

*Id.* at 1406-1407. In addition, it was held:

One of the principle obligations which bind an attorney is that of fidelity, maintaining inviolate the confidence reposed in him by those who employ him, and at every peril to himself to preserve the secrets of his client. This obligation is a very high and stringent one. It is also an attorney’s duty to protect his client in every possible way . . . By virtue of this rule, an attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client’s interests. Nor does it matter that the intention and motives of the attorney are honest. The rule is designated, not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to protect the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent. (citations omitted)

*Id.* at 1407-1408.

In rendering its decision, the court drew from precedent dealing with the “parallel doctrine of corporate practice of medicine,” stating “. . . the basic rationale of the



corporate practice prohibition is the potential for a secondary and divided loyalty to the patient. *Id.* at 1407-1408. The Court further observed:

None of those professions which involves a relationship of a personal as well as a professional character, which has to do with personal privacy, can be placed in the same category as druggists, architects, or other vocations where no such relationship exists. (citation omitted)

*Id.* at 1408. The *Gafcon* court, while upholding the trial court's ruling that Travelers had not engaged in the illegal practice of law, it reversed other trial court findings, not directly on point here. In so doing, it made the following key statement which bears on this case:

The statement in *Coumis* is still apt: "No matter how honest the intentions, counsel cannot discharge inconsistent duties." (citation omitted)

*Id.* at 1419.

As clearly spelled out in both *Barbuto I* and *Barbuto II*, physicians owe fiduciary duties to patients highly valued under Utah law. *Barbuto II* at p. 617 refers to the requirement that, "a patient's trust and confidence that disclosures to physicians will be used solely for the patient's welfare and that a patient's privacy with regard to those disclosures will be respected and protected." In this case, IHC has taken the position that a physician's ethical and fiduciary duties simply disappear if the physician is employed by the defendant corporation. Such argument and actions are not only at odds with those professional and legal standards, but violate sound public policy as well as both the letter and the spirit of the *Barbuto* decisions.

The concerns expressed in the *Barbuto* decisions apply with even more force when the physician's patient and the physician's employer are adversaries. *Barbuto II*, which

involved an independent physician, noted the unfair position that allowing ex parte communications would place the physician in. *Id.* at 620. Where the physician is dependent on the patient's adversary for his livelihood, the doctor would be placed in an impossible position ethically. In the words of the California appellate courts, "no matter how honest the intentions [a physician] cannot discharge inconsistent duties." A physician's legal and ethical duties do not change when he has a corporate employer. Both the patient and the physician need more, rather than less, protection in that scenario.

Just as in the case of salaried defense attorneys, a large health care organization should be required to adapt its policies and practices to avoid interfering with its employed physicians fulfilling their duties to their patients.

**B. Even if a *respondeat superior* exception were to be added to *Barbuto*, it does not justify the ex parte meetings at issue on this appeal.**

In this case, Jared Wilson did not claim that the defendant doctors were not entitled to counsel. Indeed, each of those doctors (none of whom are IHC employees) all had counsel. Although it might have, Wilson also did not claim that IHC could not meet with the nurses who were alleged to be negligent.<sup>7</sup>

This appeal involves the ex parte meetings with Drs. Minton, Stoddard, and Boyer, who treated Jared Wilson after the fact, who were not alleged to have been negligent, for whom Wilson did not seek to hold IHC vicariously liable, and who were never parties. (The ex parte meetings with Dr. Clark are also at issue, and are addressed *infra*.)

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<sup>7</sup> Appellant was, however, prevented from meeting with the nurses.

As noted in *Barbuto II*, p. 620 footnote 1, it was entirely appropriate for Mr. Wilson and the Wilsons' counsel to meet with Dr. Minton prior to litigation who, at that time, was prepared to be a key causation witness for his patient Jared. As noted in Appellant's initial brief, pp. 9-10 and 14, this action was filed because of Dr. Minton's encouragement and the key causation testimony he stated he would give. There is every reason to believe that but for the ex parte meetings between Minton and Appellee's counsel, he would have given the anticipated testimony. It is a matter of record that even after *Barbuto I*, Minton met several times with counsel adverse to Jared. Consequently, Jared was deprived of one of his most important witnesses.

The same is true of Minton's partner, Dr. Stoddard. Through ex parte contact with Dr. Stoddard that occurred during the November 2008 trial, including a meeting after Minton was disqualified for his ex parte contact, Dr. Stoddard was turned into an adverse causation witness against Jared. As outlined on pages 40-41 of Appellant's prior brief, Dr. Stoddard's testimony changed from having no opinion on causation when he testified on November 6 to being an adverse causation expert for IHC on November 20.

Dr. Richard Boyer, a non-IHC employee, but a person almost entirely dependent on IHC for his livelihood, did not treat Jared until several years after his injuries. His initial and untainted interpretation of the MRI of Jared's brain should have served as key causation evidence on Jared's behalf. However, as set forth in pages 10-13 and 39-40 of Appellant's prior brief, through ex parte meetings with Dr. Boyer, Appellee's counsel was able to turn both him and the medical record into key evidence against Jared. Again,

Jared never claimed that Dr. Boyer was in any way negligent, nor sought to hold IHC vicariously liable for any such conduct.

**C. *Barbuto* may not be circumvented by counsel's representing both the defendant and the physician-witness.**

In its brief, IHC argues that Jared waived its *Barbuto* violations. It is true that Jared Wilson's counsel did call Drs. Boyer, Minton and Stoddard as adverse witnesses at the trial. It is not true that in doing so, the *Barbuto* violations were waived.

Because no notice was given of Dr. Boyer's meeting with IHC's counsel, Jared's counsel did not learn until years after it had occurred that such change had resulted from an ex parte meeting. By then, the changed record had become an integral part of Jared's medical history, had been used by subsequent treating doctors, and had been considered by all of the experts. Jared's counsel had no choice but to present evidence attempting to impeach that key document and to impeach Dr. Boyer's objectivity and credibility. Being forced to try to make the best of a bad situation is not a waiver.

Dr. Minton was called for a very limited purpose, *i.e.*, to lay foundation for Jerrie Wilson's testimony regarding the occurrence and substance of the meeting at Tony Roma's restaurant. The trial court had indicated that it would require such foundation before letting Jerrie Wilson testify on that subject. Calling Dr. Minton for that very limited purpose could not have been a waiver of unrelated *Barbuto* violations.

Dr. Stoddard was called as a fact witness, an important part, to deal with the problems created by IHC's having withheld the mortality and morbidity statistics on babies born prematurely at Utah Valley Regional Medical Center. And it confirmed what

Dr. Stoddard had said earlier in his deposition, *i.e.*, that he had no opinion as to the cause of Jared's brain injuries. Appellee's position that by calling his own treating physicians for limited purposes, Jared waived any right to claim relief due to their breaches of their fiduciary duties to him is without merit. The suggestion that where illegal *ex parte* meetings take place with the patient's own doctors, the patient is forced to choose between foregoing the testimony of his own doctors altogether or waiving his rights is contrary to both fairness and sound public policy.

IHC also argues that the fact that its attorneys indicated at the depositions of Minton and Stoddard that those witnesses were being represented by IHC's counsel for purposes of the deposition put Jared Wilson in a position of waiving any rights arising from *Barbuto* violations. That is a disturbing proposition. Even if counsel represents two clients, he or she is not free to communicate or use confidential information learned in one representation for the benefit of a different representation.<sup>8</sup>

Jared Wilson had a right to assume that, absent notice to the contrary, both his doctors and IHC's counsel would follow the law as pronounced in the *Barbuto* decisions. Nevertheless, the meetings continued.

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<sup>8</sup> The depositions of Drs. Minton and Stoddard were taken June 19, 2003; Dr. Minton's was February 13, 2004. *Barbuto I* was issued August 10, 2006. In essence, Appellee is contending that Appellant waived his rights under both *Barbuto* decisions before either were issued – and that such waiver applies not only to the violations occurring before the dates of those depositions, but to all subsequent violations.

**D. The *Barbuto* rules may not be circumvented by counsel's representing both the defendant and the physician-witness.**

Subsequent to his deposition on February 13, 2004, Dr. Steven Clark left IHC and took a position with a competing health care provider. (As noted in the Appellant's prior brief, it was discovered at trial that this parting was less than friendly.) It is now apparent that IHC became concerned that it could no longer use the "employee justification" for ex parte meetings with Clark. Also, presumably, IHC had concerns regarding maintaining control over Clark. Apparently, IHC determined to deal with this concern and the intervening *Barbuto I* decision, by arranging for attorney Charles Dahlquist, a long-time IHC defense attorney, to "represent" Clark.

It was highly unusual to have legal counsel appear in a case on behalf of a non-party, and both Wilson's counsel and the court were puzzled by it. The claimed justification was that for a short period during the pendency of this case an expert that plaintiff wanted to use, Dr. Gregory DeVore, indicated that he believed Clark to have been negligent in the limited role that he played in Jared's care.<sup>9</sup>

DeVore's designation, however, was short-lived as the defendants were successful in getting the trial court to disqualify DeVore. (Defense counsel, Jaryl Rencher, claimed to have retained DeVore early in the case, although he was never paid nor was he ever designated as a potential witness.

DeVore's replacement, Dr. Barry Schiffrin, did not criticize Clark. Attorney Dahlquist later withdrew as counsel for Clark and appeared on behalf of IHC. It was not

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<sup>9</sup> After the Wilson's main liability expert, Dr. John Marshall, had been intimidated into withdrawing, Wilson designated Dr. Gregory DeVore.

until statements made by counsel during the opening statement, that Appellant's counsel realized that counsel had been preparing Clark to give testimony well beyond his role as a treating physician and to serve as an expert witness against his own patient. As soon as this was realized, Jared's counsel opposed such inappropriate behavior and sought relief from the court.

Mr. Dahlquist, who by then was trial counsel for IHC, defended what had occurred by contending that Clark was his client, and that attorneys can always speak with their own clients and stated that he was still meeting with Dr. Clark. (R 8607, Tr. p. 0844.) While there was no apparent need for Clark to have counsel, as he had never been named as a defendant in the case, it is technically true that it is permissible for anyone to seek legal counsel on any subject at any time. Consequently, it is assumed, *arguendo*, that Clark had the right to legal counsel, regardless of whether he actually needed such counsel. However, for counsel to use confidential information elicited in his representation of Dr. Clark for the benefit in his representation of IHC, directly adversarial to Dr. Clark's patient, would be patently improper.

The law has long recognized that a party may not do indirectly what it is precluded from doing directly. It is respectfully submitted that this Court should hold that claiming an attorney-client relationship may not be used as a means to circumvent *Barbuto*.

#### **IV. THE TRIAL COURT ERRED IN DENYING APPELLANT'S PRE-TRIAL REQUESTS FOR THE NEONATAL STATISTICS, BUT DID NOT ERR IN REQUIRING THEIR PRODUCTION DURING TRIAL.**

Early in this case, as it became apparent that IHC's main causation defense was "prematurity," the plaintiff recognized the critical need for discovery of historical

information kept by the hospital regarding the outcomes of preterm babies born at the hospital. Although that information was routinely shared with patients (and had been shared with the Wilsons prior to Jared's birth), IHC claimed that it was privileged. This was true even though the keepers of those statistics, Minton and Stoddard, made specific representations in their depositions concerning those details, which they claimed were in the statistics. IHC had also used its mortality and morbidity statistics for its newborn ICUs in a public 2003 Annual Report, "Caring for Our Community." (R 1172-1174.)

On February 8, 2005, the plaintiff brought a motion to compel the production of this information, arguing that (a) it was not privileged, or (b) any privilege had been waived (R 1169-1223). On April 22, 2005, the court issued a written ruling finding the requested information privileged and that, in essence, the privilege could not be waived. (R 1459-1465.) The court determined that the statute allowed a court no latitude or discretion.

In light of this ruling, plaintiff, on August 10, 2005, asked the court to strike the subject statute (U.C.A. § 26-25-3) as unconstitutional. An extensive brief was submitted detailing how the statute, as interpreted by the trial court, violated the Utah and United States constitutions, including Art. I, § 11 (the open court's provision) of the Utah Constitution, as it failed all three prongs of the three part test set forth in *Judd v. Drezga*, 103 P.3d 135 (Utah 2004), as well as violating the constitutional principles outlined in *Condemarine v. University Hospital*, 775 P.2d 348 (Utah 1989); *Berry v. Beech Aircraft Corp.*, 717 P.2d 670 (Utah 1985); *Laney v. Fairview City*, 57 P.3d 1007 (Utah 2002); *Masich v. United States Smelting Refinery and Mining Co.*, 191 P.2d 612 (Utah 1948);



*Lee v. Gaufin*, 867 P.2d 572 (Utah 1993); and *Malan v. Lewis*, 693 P.2d 661 (Utah 1984).

Appellant reasserts that contention here.

Wilson also asserted, and reasserts here, that the subject statute, as interpreted, also violates Article V, § 1 (the separation of powers clause) of the Utah Constitution. (See *Julian v. State*, 966 P.2d 249 (Utah 1998) (precluding the legislature from removing flexibility and discretion from state judicial procedure.))

The statute as IHC would interpret it would also violate Article V § 7 (the due process clause) of the Utah Constitution as well as the due process clause of the federal constitution (the Fourteenth Amendment.) (See *United States v. Richard M. Nixon*, 94 S.Ct. 3090, 418 U.S. 683 (1974) and *Herbert v. Lando*, 99 S.Ct. 1635, 441 U.S. 153 (1979), which applied the *Nixon* decision to a civil case). This motion was also denied. Wilson later asked the court to reconsider its denial in light of *Cannon v. Salt Lake Regional Medical Center, Inc.*, 121 P.3d 74 (UT App. 2005) (indicating that trial courts do have some flexibility and discretion in deciding claims of privilege under the Peer Review Statutes) ( R 4432-4446). Although the court indicated on October 23, 2008 that it would revisit the issue (Hearing Transcript, 10/23/08, p. 179-181), IHC did not give them to the court for in camera inspection until October 30, the third day of trial. (R 8605, Tr. pp. 0689-0692). It took only a matter of minutes for the court to review them in camera and order their production (R 8605, Tr. pp. 0689-0692).

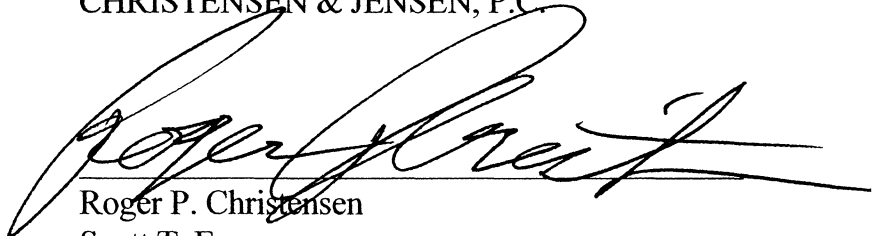
While the court did err in its rulings precluding discovery of this key evidence three years before (with the resulting prejudice to Appellant), its ruling finally requiring production was correct and should not be overturned.

## CONCLUSION

Appellant Jared Wilson requests that the judgments (including the cost judgment) against him be reversed, that he be granted a new trial, that IHC's cross appeal be denied, and for the additional relief requested in his prior brief on page 47 in paragraphs a through d.

DATED this 14th day of June, 2010.

CHRISTENSEN & JENSEN, P.C.



Roger P. Christensen  
Scott T. Evans

STEELE & BIGGS

Joseph W. Steele

*Attorneys for Plaintiff/Appellant*

## CERTIFICATE OF SERVICE

I hereby certify that a copy of **REPLY BRIEF OF APPELLANTS AND BRIEF OF CROSS-APPELLEE** was mailed to the following this 14th day of June, 2010:

JoAnn E. Bott  
Sammi V. Anderson  
MANNING, CURTIS, BRADSHAW &  
BEDNAR  
170 S Main Street, Suite 900  
Salt Lake City, UT 84101  
*Counsel for IHC Hospitals, Inc. dba  
Utah Valley Regional Medical Center*

Charles H. Dahlquist  
David J. Hardy  
Merrill F. Nelson  
KIRTON & McCONKIE  
60 East South Temple, Suite 1800  
Salt Lake City, UT 84111  
*Counsel for Intermountain Health  
Services, Inc.*

A handwritten signature in black ink, appearing to read "David J. Hardy", is written over a horizontal line.