

2009

Wilson v. IHC Hospitals Inc : Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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

Plaintiffs/Appellants 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.

**BRIEF OF
DEFENDANT-APPELLEE
AND
CROSS-APPELLANT
IHC HOSPITALS, INC., dba
UTAH VALLEY REGIONAL
MEDICAL CENTER**

Case No. 20090354

Appeal from the Judgment of the Fourth Judicial District Court
County of Utah
The Honorable Fred D. Howard, District Court Judge, Presiding
District Court Case No. 010404519

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THE PARTIES

Plaintiffs - Jerome Wilson and Leilani Wilson, as Guardians ad Litem for Jared Tanner Wilson, their minor child ("the Wilsons")

Defendants - C. Joseph Glenn, M.D.
Steven S. MacArthur, M.D.
David H. Broadbent, M.D.
IHC Hospitals, Inc. dba Utah Valley Regional Medical Center
(the "Hospital")

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STATEMENT OF JURISDICTION

The Court has jurisdiction to hear this appeal pursuant to Utah Code Ann. § 78A-3-102(3)(j).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Issue #1: Did the trial court abuse its discretion in excluding the proposed nursing module exhibits?

Standard of Review: A trial court's ruling on admissibility of evidence is upheld where there is any valid basis to do so, *Whitehead v. Am. Motors Sales Corp.*, 801 P.2d 920, 927 (Utah 1990), and it is reviewed for abuse of discretion. *Eggett v. Wasatch Energy Corp.*, 2004 UT 28, ¶ 10, 94 P.3d 193.

Issue #2: Did the trial court abuse its discretion in admitting references by both parties to collateral sources of benefits?

Standard of Review: The trial court's rulings on this issue are reviewed for abuse of discretion. *See* Standard of Review for Issue No. 1.

Issue #3: Did the trial court abuse its discretion in admitting testimony by Jared Wilson's treating physicians?

Standard of Review: The trial court's rulings on this issue are reviewed for abuse of discretion. *See* Standard of Review for Issue No. 1.

Issue #4: Did the trial court abuse its discretion in excluding part of Dr. Hyde's proposed expert testimony as irrelevant and unreliable?

Standard of Review: Exclusion of expert testimony is reviewed for abuse of discretion in which the trial court is allowed "considerable latitude," and will not be reversed unless the ruling "exceeds the limits of reasonability." *Stevensen v. Goodson*, 924 P.2d 339, 347 (Utah 1996); *State v. Hollen*, 2002 UT 35, ¶ 66, 44 P.3d 794.

Issue #5: Whether a new trial is required under the cumulative error doctrine?

Standard of Review: A new trial is not warranted under the cumulative error doctrine unless "the cumulative effect of the several errors undermines [this Court's] confidence . . . that a fair trial was held." *Utah Chapter of Sierra Club v. Air Quality Bd.*, 2009 UT 76, ¶ 54, 644 Utah Adv. Rep. 27.

Issue #6: Did the trial court correctly award costs only against Jared Wilson, as opposed to his parents, and should the costs for trial transcripts used on appeal now be awarded?

Standard of Review: Whether costs may be taxed against parents who have initiated lawsuits on behalf of their minor children is a question of law, reviewed for correctness. *Madsen v. Wash. Mut. Bank FSB*, 2008 UT 69, ¶ 19, 199 P.3d 898.¹ Costs may be awarded for trial transcripts used on appeal. *Utah R. App. P. 34(c)*.

Preservation: The issue of whether costs should be awarded against Jared's parents was briefed and ruled upon below. (*R. 8452-8458*, Ruling Re: Def. IHC's M. for Costs; *R. 8499-8501*, Ruling Re: Pl.'s Obj. to Prop. Order Re: Costs and Req. for Clarification; *R. 8502-8505*,

¹Though not listed in the Wilsons' Statement of Issues (*Wilsons' Br. pp. 1-2*), the Wilsons' Brief presents an argument that the trial court erred in awarding the Hospital costs on the grounds that the Hospital's Bill of Costs was untimely. (*Wilsons' Br. p. 46*). "A court's award of costs . . . will not [be] disturb[ed] absent an abuse of discretion." *Walker v. Hansen*, 2003 UT App 237, ¶ 14, 74 P.3d 635. The question of whether the Hospital's application for costs was timely is a legal question, which is reviewed for correctness. *Madsen v. Wash. Mut. Bank FSB*, 2008 UT 69, ¶ 19, 199 P.3d 898.

Order Granting in Part and Denying in Part UVRMC's Verified Mem. of Costs; R. 8594-8598, Ruling Re: Pl.'s Objection to Order and Req. for Clarification.)

Issue #7: Did the trial court err in allowing discovery and admission of the Hospital's privileged neonatal morbidity and mortality statistics?

Standard of Review: Whether the neonatal morbidity and mortality statistics are statutorily privileged is a question of law reviewed for correctness. *Cannon v. Salt Lake Reg. Med. Ctr., Inc.*, 2005 UT App 352, ¶ 7, 121 P.3d 74.

Preservation: The trial court first denied the Wilsons' efforts to compel the statistics (R. 1458-1465, Ruling Re: Pl.'s Second M. to Compel Disc.), then granted an *in camera* review of the Hospital's privilege log in light of *Cannon* (R. 6507-6510, 10/24/2008 Ruling), and then ruled the statistics were discoverable over the Hospital's continued objection. (R. 8605, Vol. 4, pp. 689-692.)

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

Utah R. Evid 702, Utah Code Ann. §§ 26-25-1, *et seq.* (2004).

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION IN THE TRIAL COURT.

This is a medical malpractice case. A few days after his severely premature birth at 25 weeks and weighing only 2lbs, 3 ounces, Jared Wilson ("Jared"), suffered the very type of brain bleed to which severely premature infants are especially vulnerable, leaving him physically and mentally handicapped. (R. 7121, L127 (Delivery Record)²; R. 8613, Vol. 11, pp. 2192:9 -

²R. 7121 is the trial court's final exhibit list. All trial exhibits referenced herein are contained in Part I of the Hospital's Addendum. The medical records were stipulated and

2195:10.)³ Plaintiffs Jerome and Leilani Wilson, on behalf of their son Jared, filed suit in March 2001 asserting medical negligence against independent physicians C. Joseph Glenn, M.D., Steven S. MacArthur, M.D. and David Broadbent, M.D., who were the doctors involved in Mrs. Wilson's care and Jared's delivery. (R. 10, Compl.). The Wilsons also sued the Hospital alleging medical negligence and asserting *respondeat superior* liability based on the Hospital's employed medical care providers. The Wilsons settled with Drs. Glenn, MacArthur and Broadbent before trial. (R. 8506-8511; R. 6452)⁴ The remaining claims against the Hospital were tried to the jury October 27 through November 21, 2008.

After three weeks of evidence, the eight person jury returned its unanimous verdict, finding *no negligence* on the part of the Hospital. (R. 7116, Sp. Verdict Form.)⁵ The court signed

admitted as Trial Exhibit 1. Medical record exhibits beginning with bates label "L" are Leilani Wilson's medical records and those beginning with bates label "J" are Jared's medical records. Medical records in this brief are cited to as "R. 7121," followed by a specific "L" or "J" bates label and the document's title.

³Trial transcript citations in this brief refer to the record page (stamped on the first page of each volume of the trial transcript), the trial volume, page and line of the testimony cited. Selected trial transcript excerpts are contained in Part II of the Hospital's Addendum and are identified by topic therein.

⁴Jared's parents now claim they are not parties to this action. However, they have always listed themselves as *plaintiffs* and the parties to the settlement agreement with Drs. Glenn and MacArthur are Jerome and Leilani Wilson, *individually*, and as parents and guardians of Jared. (R. 8511, Settlement Agreement, ¶ 1.) Only after suffering an adverse verdict have Jerome and Leilani Wilson unilaterally altered the case caption and party references in pleadings to divorce themselves as parties to the action, referring only to Jared Wilson as *the plaintiff*. See **Wilson's Br. Caption**.

⁵The court polled the jury and all jurors responded "yes" to the question, "Was that your verdict?" (R. 8621, Vol. 19, pp. 3901:8 - 3902:16.) At that time, no objection or request for further polling was made. *After* the jury was dismissed and *ex parte* contacts made with jurors, the court received a call from a juror who indicated that two jurors had answered "no" to the

the Judgment on January 8, 2009. (R. 7634) The Wilsons filed their Motion for New Trial on December 19, 2008 and raised many of the same issues argued on appeal. (R. 7154.) Judge Howard denied the Motion on May 21, 2009. (R. 8564) The Wilsons filed an Amended Notice of Appeal on May 26, 2009. (R. 8583)

II. STATEMENT OF FACTS

The Wilsons' statement of facts presents a version of facts which the Wilsons endeavored to establish at trial, but which the jury rejected as unpersuasive or irrelevant. Facts consistent with the jury's verdict of no negligence are presented below, followed by identification of several factual allegations contained in the Wilsons' Brief which are irrelevant to issues raised on appeal and therefore violate Utah R. App. P. 24(k).

A. FACTS RELEVANT TO THE JURY'S VERDICT THAT THE HOSPITAL WAS NOT NEGLIGENT.⁶

Premature infants are vulnerable to brain bleeds. Jared was born at 25 weeks, weighing only 2 lbs, 3 ounces, and with a body trunk the size of a dollar bill. (R. 8620, Vol. 18, p. 3456:6-10.) Notwithstanding exceptional care from Hospital employed providers, Jared suffered a brain bleed a few days after his birth and is now profoundly disabled. Even with the best care,

first question on the verdict form. The Wilsons *then* requested that the jury be re-polled, but their request was denied and the Judgment was signed. (R. 7127, Pl.'s M. to Clarify Ambiguity in Jurors Responses to Polling of Individual Jurors; R. 7634.) Though the Wilsons raise this matter in their Statement of the Case, it is not an issue on appeal.

⁶These facts are important to disposition of evidentiary issues raised on appeal because they establish the relative weight of each evidentiary issue asserted by the Wilsons in the context of the overwhelming evidence supporting the jury's verdict. This should assist the Court in determining whether each alleged error may be considered harmless as against the overall evidence supporting the jury's verdict.

extremely premature babies like Jared have a host of additional risk factors that significantly increase the risk of a brain bleed. The average twenty-five week old baby will spend 105 days in the Newborn Intensive Care Unit ("NICU"). (*Id.*, p. 3475:15-18.) One hundred percent (100%) of twenty-five week old babies have premature lung disease. (*Id.*, pp. 3462:4 - 3463:5.) Without a breathing machine, a twenty-five week old baby would die. With a breathing machine, the baby is at heightened risk for brain bleeds. (*Id.*)

In addition to premature lung disease, Jared suffered from a pneumothorax (an air leak that gets trapped between the chest wall and lung making it difficult for the lung to expand) within the first twenty-four hours of his life. (*Id.*, pp. 3463:13 - 3465:10.) Air trapped inside the chest impedes blood flow to the brain. (*Id.*, pp. 3464:19 - 3465:10.) Jared was also classified in the lowest possible category of birth weight for premature babies - "extremely low birth weight." (*Id.*, p. 3456:11-25.) Extremely low birth weight is a risk factor because the baby's head is no longer protected by the amniotic sac and the corresponding pressure that cushions the baby's developing blood vessels in its brain. (*Id.*, pp. 3459:3 - 3460:6.) Jared is also male, and males have more complications than females in prematurity. (*Id.*, p. 3456:11-25.)⁷ In sum, **one in five babies born at twenty-five weeks suffer severe brain bleeds.** (*Id.*, p. 3476:5-10.) As the jury recognized in its verdict of no negligence, Jared's disabilities occurred because of his extreme prematurity and the increased risks associated with that unfortunate fragility - in spite of competent care from Hospital providers.

⁷There is also evidence that Jared suffered cortical dysplasia, a genetic malformation of the brain which arises early in pregnancy. See **note 47** *infra*.

1. Problems with Mrs. Wilson's Pregnancy with Jared

Mrs. Wilson, a patient of Dr. Glenn, became pregnant for the sixth time in late 1994.⁸ Problems became apparent early. By December 1994, Mrs. Wilson was bleeding and an abdominal ultrasound showed a collection of blood (hematoma) within the lining of her uterus. (R. 7121, L25 (12/08/94 OB Ultrasound).) On January 4, 1995, Mrs. Wilson presented to the Hospital's Emergency Department where she received an ultrasound and was diagnosed with premature separation of the placenta from the uterine wall (placental abruption). (R. 7121, L30 (Emergency Department Record).) On February 28, 1995, another ultrasound read by Dr. Steven Clark, a Hospital-employed maternal fetal medicine specialist, showed an abnormal placenta with bleeding and decreased amniotic fluid around the baby. (R. 7121, L27 (02/28/95 Ultrasound).) Dr. Clark was so concerned that he initiated a discussion about whether to consider terminating the pregnancy. (*Id.*)

On April 11, 1995, another maternal fetal medicine specialist, Dr. Ware Branch, performed an ultrasound and determined that the fetus was 23 weeks gestation and that Mrs. Wilson had virtually no amniotic fluid. (R. 7121, L67 (04/11/95 Consultation).)⁹ Mrs. Wilson reported to Dr. Branch that she had noticed an increase in the amount of bloody discharge and suspected she may have ruptured her membranes. (*Id.*) Dr. Branch discussed with Mrs. Wilson the implications of ruptured membranes and indicated that the overall perinatal mortality rate

⁸Mrs. Wilson suffered three miscarriages over the years prior to becoming pregnant with Jared. (R. 7121, L9 (Prenatal History).)

⁹Dr. Peter Van Dorsten, a specialist in maternal fetal medicine, testified that in 1995, a baby was not considered viable until 24 weeks gestation. (R. 8613, Vol. 11, p. 2184:9-13.)

was 50%, and may be as low as 30%. (*Id.*) Mrs. Wilson was also told that the baby had only a 15% to 25% chance of being born developmentally normal. (*Id.*)

2. Mrs. Wilson's April 11, 1995 Admission to the Hospital

On April 11, 1995, *more than four months before her August 14, 1995 due date*, Mrs. Wilson was admitted to the Hospital by Dr. Glenn for bedrest and observation. (R. 7121, L83 (04/11/95 Progress Note).) Her diagnosis was "chronic abruption with bleeding." (*Id.*) Dr. Glenn's plan was to "Opt for cesarean section if infection/labor/fetal distress/or extended abruption occurs." (*Id.*) Dr. Glenn noted: "patient fully informed of risk of classical cesarean section, poor prognosis for infant." (*Id.*)

3. Nursing Care Provided to Mrs. Wilson

Mrs. Wilson's condition was monitored by the nursing staff and Dr. Glenn from her admission on April 11, 1995 until the morning of April 19, 1995, when Dr. Glenn left for vacation.¹⁰ Before leaving, Dr. Glenn arranged for physician coverage which included Drs. Broadbent and MacArthur. The physicians were informed of Mrs. Wilson's history, her then-current condition and troublesome prognosis. (R. 7121, L83-85 (04/11/95 - 04/19/95 Progress Notes); R. 8613, Vol. 14, p. 2845:14 - 2846:12.) The nurses were told which physician to contact during Dr. Glenn's absence. (R. 8605, Vol. 4, p. 799:12-22.)

During the evening of April 19, 1995, Rebecca Berg, R.N., checked Mrs. Wilson and

¹⁰All nurses who cared for Mrs. Wilson were Level III experienced, independent functioning nurses. (R. 8619, Vol. 17, pp. 3351:4 - 3352:7.) In fact, the nurses were specifically selected by Mrs. Wilson's friend, Lisa Fullmer, R.N., who was the Labor and Delivery Clinical Educator at the Hospital. (*Id.*, p. 3356:14-25.) Nurse Fullmer lives three houses from the Wilsons and was close to the family. (*Id.*, pp. 3347:16 - 3350:7.)

performed "peri care" (checking Mrs. Wilson for vaginal discharge, changing "peri pads" and washing the peritoneum) *seven* times between 6:00 p.m. and 6:00 a.m. (R. 8605, Vol. 4, pp. 796:5 - 798:6.) She did not observe or smell anything unusual. (*Id.*) Dr. Broadbent came to the hospital to personally evaluate Mrs. Wilson and while he was there, he interacted with the nurses, talked with the Wilsons and read the fetal heart monitor tracing. (R. 8605, Vol. 4, pp. 812:8 - 816:17; R. 8613, Vol. 11, p. 2076:10 - 2083:14.) At 3:24 a.m. and 4:14 a.m., the tracing showed two variable decelerations. (R. 8605, Vol. 4, pp. 742:23 - 743:1, p. 748:11-15.) Before Dr. Broadbent left the hospital at 4:30 a.m., he re-examined the tracing and discussed blood administration options with the Wilsons. (R. 7121, L123 (04/19/95 Labor Flow Sheet); R. 8613, Vol. 11, pp. 2078:16 - 2081:6.)

At 6:00 a.m., the nurses changed shift and Mary Mehew, R.N., assumed Mrs. Wilson's care. Following report from Nurse Berg, Nurse Mehew took Mrs. Wilson's temperature at 6:40 a.m. and noted that it was 100.9 F. (R. 7121, L125 (04/20/95 Labor Flow Sheet).) She called the Hospital laboratory to get Mrs. Wilson's Complete Blood Count ("CBC") test results and then phoned Dr. MacArthur at 7:00 a.m. *Id.*¹¹

Dr. MacArthur arrived around 7:30 a.m., evaluated Mrs. Wilson and looked at the fetal heart monitor tracing. (R. 8616, Vol. 14, pp. 2851:7 - 2852:25.) At that time, Mrs. Wilson's cervix was closed and Dr. MacArthur believed the baby was doing well. (R. 8616, Vol. 14, pp.

¹¹Dr. Broadbent testified that it was correct for Nurse Mehew to get the CBC labs before she called Dr. MacArthur. (R. 8613, Vol. 11, pp. 2096:12 - 2097: 2.) Dr. Broadbent also testified that it wasn't important that the nurses call him, just that the doctor be notified if a critical temperature was reached. (*Id.* at pp. 2095:6 - 2096:11.) Dr. Broadbent testified that he was only on call until Dr. MacArthur could be reached. (*Id.*) Dr. MacArthur testified that he was not critical at all of the nurse calling him instead of Dr. Broadbent. (R. 8616, Vol. 14, p. 2849:18-20.)

2858:11 - 2859:11, pp. 2862:22 - 2864:4.) Dr. MacArthur checked Mrs. Wilson again at 8:15 am and found her cervix still closed with no signs of labor. (*Id.*, p. 2869:1-23.) The nurses paged Dr. MacArthur to return to Labor and Delivery when Mrs. Wilson unexpectedly started contracting. (*Id.*, pp. 2870:10 - 2872:12.) When Dr. MacArthur arrived, Mrs. Wilson was in the c-section operating room, fully dilated and vaginal delivery was imminent. *Id.*

Baby Jared was delivered quickly and without evidence of injury at 9:33 a.m. (*Id.*, pp. 2872:18 - 2874:4.) Dr. MacArthur testified that the baby experienced no problems from the vaginal delivery. (*Id.*, pp. 2873:6 - 2874:22.) Mrs. Wilson's placenta and the umbilical cord were sent to the laboratory for inspection.¹² *The rapidity of Mrs. Wilson's delivery, from having a closed cervix with no signs of labor at 8:15 am to complete delivery by 9:33 am, was described not only as "unusual," but "almost unheard of."* (R. 8620, Vol. 18, p. 3590:4-10.)

4. Jared's Condition At Birth

At birth, Jared weighed 2 lbs. and 3 ounces. (R. 7121, L127 (Delivery Record).) His Apgar scores, assigned by Hospital-employed neonatologist Dr. Ronald Stoddard, were "3" at one minute after birth, and "8" at five minutes after birth. (R. 8611, Vol. 9, pp. 1565:8 - 1568:1.)¹³ A cord blood gas was not ordered by any of the attending physicians because Jared

¹²The membranes attached to the placenta are extracted by the obstetrician and put into a metal pan. They are then transferred to a lidded container and sent to the laboratory. (R. 8619, Vol. 17, pp. 3381:19 - 3382:18.) Jared's cord blood was also sent to the laboratory for blood typing. This is not the same as a cord blood gas. (*Id.*, pp. 3383:5 - 3384:19.)

¹³Apgar scores are a quantitative estimate of the condition of the infant 1 to 5 minutes after birth, derived by assigning points to the quality of heart rate, respiratory effort, color, muscle tone and reflexes. A score of 8 is considered good or normal. The maximum or best score an infant can receive is 10. (*Id.*, pp. 1566:3 - 1569:4.)

was alert and vigorous and had a normal 5 minute Apgar score. (*Id.*, pp. 1577:19 - 1578:1.)

Shortly after birth, Jared was transferred to the NICU where Hospital-employed neonatologists Drs. Stoddard and Minton cared for him. (R. 7121, J2-4 (History & Physical).) Jared's first blood gas, taken 12 minutes after his birth, showed no sign of asphyxia or ischemic injury. (R. 8611, Vol. 9, p. 1577:1-8.) Dr. Stoddard testified there was no evidence of hypoxic-ischemic injury at the time of birth based on the rapidity of resuscitation and initial blood pressure. (*Id.*, pp. 1580:9 - 1582:2.) Initially, Jared was assessed to be 27 weeks gestation, but later determined to be only 25 weeks gestation based on ultrasounds, the date of Mrs. Wilson's last menstrual period and on Jared's growth. (*Id.*, pp. 1591:16 - 1592:11.)¹⁴

Based on the odor present at birth, Dr. MacArthur's delivery note states that Jared was "grossly infected" at birth. Dr. MacArthur testified at trial that this note was an incorrect assumption. (R. 8616, Vol.14, p. 2874:14-19, p. 2876:10-21.) All cultures of Jared's blood and tracheal secretions were negative for infection. (R. 8611, Vol. 9, pp. 1584:22 - 1586:13.) Even though Jared's physicians watched for infection or "suspected sepsis," it was never realized. (*Id.*; R. 7121, J611 (Transfer Summary), J619 (Discharge Summary).)¹⁵

¹⁴The Wilsons expert, Barry Schiffrin, M.D., testified that Jared was only 25 weeks gestation. (R. 8610, Vol. 8, p. 1405:4-17, pp. 1407:12 - 1408:8.) On discharge from the NICU Jared was again noted to be 27 weeks gestation; however, Dr. Stoddard testified that number had been perpetuated from the earlier incorrect admission note. (R. 8611, Vol. 9, pp. 1591:16 - 1592:18.)

¹⁵The Wilson argue that antibiotics administered to Mrs. Wilson shortly before Jared's birth affected the culture results. However, antibiotics given 90 and 18 minutes pre-birth would not affect culture results. The time period is too short. (R. 8611, Vol. 9, p. 1588:9-22.) Further, negative cultures of amniotic fluid taken from Jared's endotracheal tube demonstrates there was no infection in the amniotic fluid. (*Id.*, pp. 1585:3 - 1586:2.)

Jared's physicians found no evidence that Jared was hypoxic at birth or suffered from hypoxic or ischemic brain damage. (R. 8611, Vol. 9, p. 1577:1-8, pp. 1580:9 - 1582:2; R. 8620, Vol. 18, pp. 3646:23 - 3647:15.) The Wilsons' retained expert, Dr. Ronald Gabriel, acknowledged that Jared's first brain ultrasound, taken the day after his birth, on April 21, 1995, was normal. (R. 8612, Vol. 10, pp. 1926:23 - 1927:8; R. 7121, J508 (04/21/95 Radiology Report).) While Jared's severe prematurity made him particularly susceptible to post-birth brain bleeds, his clinical condition at delivery was hopeful.

5. Diagnosis of Jared's Brain Bleed While in the NICU

On May 1, 1995, ten days after Jared's birth, a cranial ultrasound showed that Jared had suffered a severe brain bleed or Grade IV intraventricular hemorrhage. (R. 7121, J509 (05/01/95 Radiology Report).) This type of hemorrhage can lead to serious neurological problems. (R. 8610, Vol. 8, p. 1489:8-11.) After months of intensive care, Jared was eventually discharged from the Hospital on September 25, 1995. (R. 7121, J615 (Discharge Summary).)

6. Expert Standard of Care Testimony Supporting the Jury's No Negligence Verdict.

Peter Van Dorsten, M.D., and Kathleen Simpson, R.N., Ph.D, provided expert testimony on the standard of care. Dr. Van Dorsten, a specialist in maternal fetal medicine, testified that the nursing care was entirely appropriate. (R. 8613, Vol. 11, p. 2198:6-16.) Specifically, he opined that the fetal heart monitor tracing never rose to fetal risk and there was no need for Nurse Berg to have reported any noted decelerations. (*Id.*, pp. 2208:25 - 2210:10.) He further testified it was appropriate for the nurses to call Dr. MacArthur rather than Dr. Broadbent, who was previously on call. (*Id.*, pp. 2207:19 - 2208:21.)

Dr. Simpson testified that the Hospital's nurses *exceeded* the standard of care. (R. 8614, Vol. 12, pp. 2313:21 - 2314:12.) Dr. Simpson testified that the decelerations identified at 3:24 a.m. and 4:14 a.m. were not clinically significant, that Nurse Berg was not required to chart them, and that the standard of care did not require that she report them to Dr. Broadbent. (*Id.*, pp. 2323:18 - 2324:11.) With regard to Nurse Mehew, Dr. Simpson testified that she used correct judgment on the morning of Jared's birth in obtaining the CBC laboratory work before calling Dr. MacArthur, who was the "fresh" physician on-call. (*Id.*, pp. 2345:2 - 2347:12.)

B. RESPONSE TO FACTUAL ALLEGATIONS RAISED BY THE WILSONS BUT IRRELEVANT TO ISSUES RAISED ON APPEAL AND SUBJECT TO MOTION TO STRIKE UNDER RULE 24(k).

The Wilsons' 20-page statement of facts devotes several pages to allegations that have no relevance to issues raised on appeal and which are apparently intended to bias the reader against the Hospital and influence the outcome of this appeal by coloring the Hospital in an unseemly light. The jury was burdened with presentation of these same scandalous issues at trial and found the Wilsons' accusations and attacks on the integrity of the Hospital and its witnesses to be unpersuasive and/or irrelevant distractions. They are similarly irrelevant here.

The sections of the Wilsons' fact statement within this category include: fact statement section 4, which raises unsupported allegations of discovery misconduct related to Hospital statistics (Wilsons' Br. p. 13); fact statement section 7, which accuses the Hospital of manipulating the Wilsons' once-retained expert, Dr. John Marshall, to withdraw, and by clear implication, bribery of Dr. Marshall's wife, Elaine Marshall (Wilsons' Br. p. 15); fact statement section 10, which accuses the Hospital of improperly referencing genetic evidence in opening,

at trial, and in closing (*Wilsons' Br. p. 23*); fact statement section 11, which speculates that the Hospital "knowing that all of the jurors or their families had been patients at the subject hospital" purposefully placed hospital employees who were actual care providers of jurors in the courtroom for the purpose of intimidating jurors and accuses the Hospital's counsel, Mr. Dahlquist, of deceitfully not disclosing to the court that he would be featured in the *Deseret News* and in the LDS Church's *Ensign* magazine during trial so that the jury (which the Wilsons assert was "predominately, if not entirely" members of the LDS Church (*id.*)) would be influenced by Mr. Dahlquist's position in the LDS Church. (*Wilsons' Br. p. 23*); and fact statement section 12, alleging that the Hospital lost or destroyed maternal membranes sent to the lab for analysis. (*Wilsons' Br. p. 24*). Each of these scandalous allegations endeavors to distract attention from the care given in Leilani and Jared Wilson's hospital room, and none pertains to any of the issues raised on appeal.

Utah R. App. P. 24(a)(7) requires an appellant to provide a statement of facts "relevant to the issues presented for review. . . ." *Utah R. App. P. 24(k)* requires briefs to be "free from burdensome, irrelevant, immaterial or scandalous matters" and warns that "[b]riefs which are not in compliance may be disregarded or stricken, on motion or *sua sponte* by the court, and the court may assess attorney fees against the offending lawyer." *Utah R. App. P. 24(k)*. The Hospital contends that sections 4, 7, 10, 11 and 12 of the Wilsons' fact statement violate this rule and requests that this Court invoke the penalties referenced in *Rule 24(k)*. An appropriate Motion is filed contemporaneously with this brief.

SUMMARY OF THE ARGUMENT

None of the issues raised by the Wilsons on appeal is meritorious. The nursing modules were properly excluded because they did not exist during the relevant time period and could not be connected to the Hospital or the Labor & Delivery Unit. The trial court did not abuse its discretion in managing collateral source references by both parties consistent with the law and the parties' stipulations, particularly where the Wilsons elicited the very testimony to which they most strenuously object on appeal. The trial court correctly admitted testimony by Jared's treating physicians and did not abuse its discretion in taking judicial notice of Judge Stott's Order. The trial court's decision to exclude Dr. Hyde's proposed expert testimony as irrelevant, unreliable and unnecessary was within its considerable discretion, especially where the court allowed the Wilsons to explore potential bias with each individual witness. The cumulative error doctrine has no application because the Wilsons fail to raise a single reversible error. And, finally, the Hospital asserts the trial court erred in taxing costs against Jared, as opposed to his parents, and in allowing discovery and admission at trial of the Hospital's privileged neonatal morbidity and mortality statistics.

ARGUMENT

The jury's no negligence verdict focused entirely on the care given in the Labor and Delivery Unit where Jared was born. In sharp contrast, the Wilsons' appeal places no attention on the care given to the Wilsons. Rather than challenging the events upon which the jury's verdict is based, the Wilsons' appeal relates only to events in litigation and trial occurring more than ten years after the centrally dispositive facts upon which the jury verdict rests. Indeed, only

one of the issues raised by the Wilsons on appeal (admission of the nursing modules) relates to the jury's verdict of no negligence. It is addressed in Section I. The remaining evidentiary issues raised by the Wilsons are addressed in Section II.

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING THE PROPOSED NURSING MODULES BECAUSE THEY DID NOT EXIST DURING THE RELEVANT TIME PERIOD AND COULD NOT BE CONNECTED TO THE HOSPITAL'S LABOR & DELIVERY UNIT.

The Wilsons raise only one issue relevant to the jury's verdict that the Hospital did not breach the standard of care: the trial court's refusal to admit nursing modules which the Wilsons' counsel obtained from an unrelated case, involving a different facility, and from a time period two years *after* Jared's birth.¹⁶ The Wilsons unsuccessfully attempted to transport these modules into this case as evidence. The modules were not admitted because they did not exist at the time of Jared's birth and could not be connected to the Hospital's Labor & Delivery unit. The trial court's evidentiary ruling is reviewed for abuse of discretion. *Eggett v. Wasatch Energy Corp.*, 2004 UT 28, ¶ 10, 94 P.3d 193.¹⁷

The Wilsons questioned two Hospital employees, Karie Minaga-Miya and Lisa Fullmer,

¹⁶During discovery the Wilsons requested that the Hospital "produce all documents, films, photos and other materials used in 1995 for training of UVRMC nurses" (R. 1289) In response, the Hospital produced a variety of policies, procedures and protocols as well as a box of VCR tapes responsive to the Wilsons' request. See Addendum, Part III, *UVRMC's Supp. Response to Plaintiffs' Request for Production of Documents*. No training modules were produced because in 1995 the Hospital had no Labor and Delivery training modules. (R. 8619, Vol. 17, p. 3415:10-12, p. 3416:5-13.)

¹⁷"For an error to require reversal, the likelihood of a different outcome must be sufficiently high to undermine confidence in the verdict." *Larsen v. Johnson*, 958 P.2d 953, 958 (Utah Ct. App. 1998) (quotation and citation omitted). "The more evidence supporting the verdict, the less likely there was harmful error." *Id.*

concerning the modules. Ms. Minaga-Miya, a risk-manager, could not lay any foundation and testified that the Labor & Delivery clinical educator, Lisa Fullmer, was responsible for Labor & Delivery training. (R. 8612, Vol. 10, p. 1796:18-21.) Lisa Fullmer then testified that proposed exhibit 36 **"has nothing to do with the labor and delivery unit"** at Utah Valley Regional Medical Center (R. 8619, Vol. 17, p. 3404:17-18) (emphasis added), and that it was nothing she had ever seen before. (*Id.*, p. 3407:22-25) (emphasis added). With respect to the remaining offered modules, Ms. Fullmer testified that the Labor & Delivery modules for which she was responsible **"were not written in 1995,"** (*id.*, p. 3416:18) (emphasis added), that training in Labor & Delivery as of 1995 was conducted by training videos that had been produced to the Wilsons (*id.*, p. 3415:25), and that written modules at the Hospital for the 1995 time period **"don't exist."** (*Id.*, p. 3416:21) (emphasis added).¹⁸

The court heard argument on admission of the modules the next morning. The Hospital's counsel confirmed that the modules had been produced by Intermountain, but that they had been produced "[i]n another case, for a different time period, for a different hospital." (R. 8620, Vol. 18, p. 3448:10-11.) The court found the modules "authentic" because they had

¹⁸The Wilsons sought to introduce the nursing modules to show that Nurse Berg breached the standard of care by failing to report two decelerations in the early morning hours prior to Jared's birth. These included proposed exhibit 8 (titled Orem Community Hospital - Module 2), proposed exhibit 9 (titled Orem Community Hospital & UVRMC - Module 3) and proposed exhibit 36 (titled UVRMC Mother-Baby Unit - Module 6). Proposed exhibit 10 is a March 14, 2001 transmittal letter producing the documents in the case of *Christensen v. Orem Community Hospital*. The Wilsons first moved for the admission of proposed exhibits 8-10 during the testimony of Kari Minaga-Miya (R. 8612, Vol. 10, pp. 1799:5 - 1800:7), then moved again for admission of proposed exhibits 8 and 9 during the testimony of the Hospital's nursing expert Dr. Kathleen Simpson (R. 8614, Vol. 12, pp. 2418:17 - 2419: 23), and then moved the admission of proposed exhibits 9 and 10 during the testimony of Lisa Fullmer. (R. 8619, Vol. 17, p. 3414:10-11.) *The Wilsons never moved for the admission of proposed exhibit 36.*

been produced by Intermountain in another case. (*Id.*, *Ins.* 13-14.) However, because the modules had no connection to the Hospital, to the Labor & Delivery Unit, or the relevant time period, the court was correctly "unpersuaded that there's adequate foundation." (*Id.*, *p.* 3451:19-20.) The court stated that it recognized that "there's a low threshold for relevance, ***but I need to get through foundation.*** Respectfully, they are not received." (*Id.*, *Ins.* 22-24) (emphasis added).

The Wilsons argue incorrectly on appeals that the "court conflated the legal question of foundation with the weight of evidence." (*Wilson's Br.* *p.* 34.)¹⁹ In reality, the Wilsons mistakenly conflate authenticity with relevance, and the trial court correctly recognized that foundation is a prerequisite to relevance. Proposed evidence may be both perfectly authentic and entirely irrelevant as lacking the foundation needed to connect it to a fact issue in dispute in the case. See *Utah R. Evid.* 401. The Wilsons' effort to salvage the evidence under the best evidence rule is also unavailing because Rule 1004 simply forgives the necessity of introducing an original document. *Utah R. Evid.* 1004. The legitimacy of the photo copies offered was not in issue. **Rule 1004 does not permit evidence entirely lacking in foundation to be admitted as "best evidence" in place of non-existent evidence.** *Id.*

The trial court correctly analyzed the foundational issues associated with the nursing modules and was well within its broad discretion in excluding them. It is also important to note that, although the modules were excluded, the Wilsons were permitted to elicit testimony from

¹⁹The Wilsons wrongly assert that the court "seemed to acknowledge their relevance." (*Wilson's Br.* *p.* 15.) In fact, the trial court correctly assessed that the modules were entirely irrelevant because there was no foundation to connect the modules to the Labor & Delivery Unit at the Hospital during the relevant time. (*R.* 8619, *Vol.* 17, *p.* 3345:22-24.)

their own expert, Dr. Schiffrin, concerning the content of the modules (*see, e.g.*, R. 8608, Vol. 6, p. 1203:9-13), and were also permitted to cross-examine the Hospital's nurse expert Dr. Simpson concerning the modules' content. (R. 8614, Vol. 12, pp. 2419:24 - 2425:1.) Given the abundant evidence that the Hospital's care providers met the standard of care, and in light of the fact that the Wilsons were allowed to fully examine witnesses on these documents, the Wilsons have not shown how admission of the modules would have changed the jury's verdict. Any perceived error is therefore harmless. *Larsen*, 958 P.2d at 958.

II. EVIDENTIARY ISSUES RAISED ON APPEAL UNRELATED TO THE JURY'S FINDING OF NO HOSPITAL NEGLIGENCE.

All issues addressed below relate to evidentiary issues that are unrelated to the jury's dispositive determination that the Hospital acted appropriately in caring for Jared.

A. THE COURT DID NOT ABUSE ITS DISCRETION IN MANAGING COLLATERAL SOURCE EVIDENCE CONSISTENT WITH THE LAW & THE PARTIES' STIPULATIONS.

"The collateral source rule provides that a wrongdoer is not entitled to have damages, for which he is liable, reduced by proof that the plaintiff has received . . . indemnity from the loss from an independent source." *Mahana v. Onyx Acceptance Corp.*, 2004 UT 59, ¶ 37, 96 P.3d 893.²⁰ This appeal does not involve application of the collateral source rule itself. Rather, the Wilsons assert reversible error because the jury was exposed to information suggesting they had received collateral source benefits. The policy in support of excluding collateral source evidence is that

²⁰The rule is couched in policy which favors a double recovery to the victim rather than allowing a wrongdoer to enjoy reduced liability based upon the victim's recovery from independent sources, and the policy of encouraging insurance by not reducing a plaintiff's award as a result of independent insurance recovery. *Green v. Denver & Rio Grande W. R.R. Co.*, 59 F.3d 1029, 1032 (10th Cir. 1995).

a jury may be less inclined to award damages *if they perceive that a plaintiff may obtain a double recovery.*
Phillips v. W. Co. of N. Am., 953 F.2d 923, 930 (5th Cir. 1992).

The Court reviews the trial court's ruling on admissibility for abuse of discretion. *Eggett*, 2004 UT 28, ¶ 10, 94 P.3d 193. An evidentiary error does not require reversal unless "the likelihood of a different outcome [is] sufficiently high to undermine confidence in the verdict."
Larsen, 958 P.2d at 958.

1. The Wilsons Waived Any Claim of Error Relating to Collateral Source Evidence by Stipulating in Front of the Jury to the Absence of Out-of-Pocket Expenses, by Agreeing to the Procedure Followed by the Court with Respect to Collateral Source References and by Eliciting the Testimony to Which They Now Object.

Shortly before trial, the court granted the Wilsons' motion in limine "to preclude any evidence or statements *relating to the existence of health insurance or payments.*" (R. 5417; Wilson's Br. App., Ex. 2, 10/23/08 Pretrial Hr'g Tr., p. 23.) (emphasis added) The Wilsons now contend that the jury's finding of no negligence must be reversed based on general references to collateral source damages evidence during trial. This argument fails because, during the trial's first witness, the Wilsons stipulated, *in front of the jury*, to the absence of out-of-pocket expenses, because the Wilsons expressly assented to the exact structure and procedures followed during trial with respect to collateral source references and because the Wilsons' counsel extracted from the Wilsons' own witnesses the very testimony to which they now most strenuously object.

This issue is controlled by three stipulations which the Wilsons proposed or to which they expressly assented during trial. **First**, during examination of the trial's first witness, Jerome Wilson, the Wilsons offered a stipulation that they had chosen to waive all claims for out-of-

pocket expenses. (R. 8605, Vol. 4, p. 621:18-20 ["We're not claiming out-of-pockets. We haven't kept records, and so we're not claiming them."]; *Id.*, p. 622:13-15 ["Your Honor, we have stipulated that we're waiving those expenses."].) **This stipulation was memorialized on the record and in the presence of the jury.** (*Id.*, p. 656:14-17 ["[A] stipulation was made on the record in the presence of the jury that the plaintiff is not claiming out-of-pocket expenses."].) Importantly, this stipulation is not limited to medical-related expenses potentially covered by collateral sources such as health insurance, *but also extends to numerous past out-of-pocket expenses not subject to any collateral source benefit*, such as home modifications, special transportation, special food expenses, and non-medical equipment and supplies. **Second**, the parties agreed to present the jury with a stipulated amount for past medical expenses - \$799,518. (R. 8610, Vol. 8, p. 1526:4-18; R. 8611, Vol. 9, p. 1747:21-24, p. 1749:1-2.) **Third**, Wilsons' counsel also specifically agreed within the first two days of evidence that any false impression concerning the absence of out-of-pocket expenses resulting from the Wilsons' stipulation of no out-of-pocket expenses would be resolved by advising the jury of liens against any judgment by Medicaid and insurers for the full amount of past medical expenses. (R. 8605, Vol. 4, pp. 657-59.)²¹ The Wilsons' counsel then affirmed his assent to this arrangement again on the next day of trial. (R. 8607, Vol. 5, pp. 981-

²¹"MR. CHRISTENSEN: And this is the problem. The false impression has now been created to this jury that the Wilsons . . . are on a free ride without expenses. That is not true. By law, Medicaid has a lien, and so does Blue Cross, and any other health insurer on this recovery." (R. 8605, Vol. 4, p. 657:18-23.) "THE COURT: And that's going to be presented, and you can - - and there may be a lien that attaches to it, but that's going to come in. So your - - the false impression is going to be resolved with the presence of that evidence. MR. CHRISTENSEN: **That's fine. If we can present it through the Blue Cross and Medicaid people, then that's fine.**" (*Id.*, p. 659:12-19.) (emphasis added).

The Wilsons now contend trial references entirely within the aegis of this stipulated structure are reversible error, even though the Wilsons stipulated to the absence of out-of-pocket expenses in front of the jury *and then solicited from their own witnesses the most targeted and specific statements of collateral source evidence*. For example, during the trial's first witness, and immediately following the Wilsons' stipulation that they had no out-of-pocket expenses, the following exchange occurred upon examination of Mr. Wilson **by the Wilsons' own counsel**:

Q [Mr. Christensen]: Have the bulk of Jared's medical expenses been paid by health insurance or Medicaid?

A [Mr. Wilson]: Yes.

(R. 8605, Vol. 4, p. 652:12-14) (emphasis added). This exchange, elicited by the Wilsons' own counsel on the first day of evidence, constitutes the most core, complete and invasive disclosure of collateral source evidence during the entire trial. The other disconnected piecemeal disclosures to which the Wilsons object on appeal pale in comparison.²³ The Wilsons' stipulations concerning collateral source evidence and subsequent solicitation at trial of the very evidence to which they now object forecloses this issue on appeal both by waiver and under the

²²Mr. Christensen objected to questions by Mr. Dahlquist to the Wilsons' life care planner concerning the absence of the Wilsons' out-of-pocket expenses for equipment and supplies. During a side-bar, and consistent with the prior day's agreement, the court ruled that Mr. Dahlquist could ask "What they would have to pay themselves, personally," to which Mr. Christensen responded: "Then we have introduced insurance, which ***as I indicated yesterday, I'm willing to do***, but it's got to be the whole package." (R. 8607, Vol. 5, p. 982:18-24.) (emphasis added)

²³The Wilsons' counsel similarly injected other specific collateral source evidence by asking the Wilsons' own life care planner, Laura Fox, to affirm that the Wilsons had received \$8,000 per year from the Division of Services for People with Disabilities for the purpose of paying people to come in and help with Jared. (R. 8607, Vol. 5, p. 997:9-18.)

doctrine of invited error.²⁴

The stipulated structure for dealing with collateral source evidence is manifest not only by the Wilsons' counsel's own solicitation of the most specific collateral source evidence from the Wilsons' own witnesses, but also by the *absence* of preserving objections to Mr. Dahlquist's subsequent and less specific questions which the Wilsons now endeavor to raise on appeal. Indeed, *after this stipulated structure was reached early in the trial*, the Wilsons either failed to object at all, objected on other grounds, or raised an objection resolved by stipulation. For example, the Wilsons' counsel objected that the Hospital's counsel was "misconstruing the law" when Mr. Dahlquist asked the Wilsons' life care planner if she knew that the Wilsons did not have to pay for Jared's wheelchair (R. 8607, Vol. 5, p. 981:5-6), made a "relevance" objection when Mr. Dahlquist asked the Wilsons' economist if he was aware of the parties' stipulation concerning no out-of-pocket expenses (R. 8611, Vol. 9, p. 1760:7-20), and made a sustained objection of "calls for speculation" regarding Jared's entitlement to *future* benefits. (*Id.*, p. 1767:16-19). These non-collateral source objections are insufficient and the Wilsons also failed to raise preserving objections to the other allegedly improper collateral source references inventoried in their brief.²⁵

²⁴Under the invited error doctrine, "a party cannot take advantage of an error committed at trial when that party led the trial court into committing the error." *State v. Winfield*, 2006 UT 4, ¶ 15, 128 P.3d 1171. Appellate courts will not review any issue, even for plain error, where "counsel, either by statement or act, affirmatively represented to the [trial] court that he or she had no objection to the [proceedings]." *Id.* at ¶ 14. Stated simply: "[Y]ou can't complain about a result you caused." 21 Wright & Miller, Fed. Prac. & Proc. Evid. § 5039.2 (2d ed. 2009).

²⁵The statement of facts in the Wilsons' Brief asserts, without support, that there were 17 improper references to collateral source evidence by the Hospital. The Wilsons' Brief contains 12 record cites to such alleged violations. (Wilson's Br. pp. 17-22) Three of the 12 references occur *without objection* during the trial's first witness, **prior to the stipulated structure for dealing with collateral source evidence documented during that same witness's**

Moreover, having stipulated in front of the jury to the absence of out-of-pocket expenses, *the Wilsons cannot credibly assign error to the Hospital's counsel's reference to a fact that the Wilsons published to the jury by stipulation.*²⁶

At the conclusion of the trial, the jury was advised in closing argument by the Wilsons' counsel of the parties' stipulation concerning the almost \$800,000 of past medical expenses. (R. 8621, Vol. 19, p. 3810:12-15.) The court then instructed the jury consistent with the law and with the parties' stipulations for dealing with collateral source evidence. Specifically, the court instructed that Medicaid and the Wilsons' health insurers "have liens entitling them to be reimbursed from any award in this case" and that "***no money will go the plaintiffs until such liens are satisfied.***" (Jury Instruction No. 50, R. 8621, Vol. 19, pp. 3761:22 - 3762:6) (emphasis

testimony. (R. 8605, Vol. 4, p. 659:12-19.) Thereafter, and other than noted above, none of the allegedly offensive statements cited in Wilsons' Brief resulted in a collateral source objection. (R. 8607, Vol. 5, p. 979:6-17 [no specific objection stated and no question pending]; *id.*, pp. 981:16 - 983:10 [side bar resulting in affirmation of prior stipulation]; *id.*, p. 985:1-4 [no objection]; *id.*, p. 986:10-17 [no objection]; R. 8616, Vol. 14, pp. 2782-83 [oral argument to court *outside presence of jury* regarding Wilsons' motion in limine to exclude references to Medicaid and other government programs in testimony of the Hospital life care planner John Janzen]; R. 8621, Vol. 19, pp. 3819-20 [overruling objection raised by Mr. Christensen in Mr. Dahlquist's summation regarding reference to stipulation already published to the jury that the Wilsons had no out of pocket expenses].) Additionally, the Wilsons never moved to strike any of the collateral source evidence references to which they object.

²⁶Neither does Wilsons' motion for mistrial based on admission of collateral source evidence preserve the issue for appeal. Raised on the 6th day of evidence (November 6, 2008), this motion was not based on any alleged improper *past* admission of collateral source evidence. Rather, to the court's astonishment, *the motion was based on anticipated future questioning* of Wilsons' economic expert based upon cross-examination questions presented to the same expert in a different case, in a different court, involving a different plaintiff, eight months earlier. (R. 8611, Vol. 9, p. 1617:18-22 ["THE COURT: I'm not sure I understand. This witness has not been presented. *You're basing a motion on what you have not yet heard, that you expect they will do?* MR. CHRISTENSEN: This is all coming."].) (emphasis added) Understandably, the court denied the motion based on the grounds that it had no "record as to future testimony." (*Id.*, p. 1639:19-21.)

added).²⁷ Thus, the trial concluded with respect to collateral source evidence exactly consistent with the arrangement consented to by the parties *and the objective of preventing the jury from perceiving a potential double recovery was precisely met.* The Wilsons are now without basis to assert reversible error.²⁸

2. The Cases Cited by Wilsons are Inapposite Because None Involves the Appellant's Assent to the Procedures Concerning Collateral Source Evidence, Because Collateral Source Evidence in this Case Was Not Admitted to Prove a Substantive Issue, and Because This Jury Was Specifically and Correctly Instructed on Collateral Source Evidence.

The Wilsons cite six cases in support of their argument that collateral source references during trial constitute reversible error. Two of the cases cited, *Mabana*, 2004 UT 59, 96 P.3d

²⁷Exactly consistent with *Utah Code Ann. § 78B-3-405(5)*, the jury was also told that evidence of future government programs could be considered only to the extent they are available irrespective of income, that Medicaid could not be considered, and that future non-governmental programs could not be considered. (Jury Instruction No. 51, *R. 8621, Vol. 19, p. 3762:7-20.*) The jury was also told not to "speculate on or consider any other possible sources of benefit the plaintiffs may have received." (Jury Instruction No. 48, *R. 8621, Vol. 19, p. 3761:10-17.*) The court informed the jury it would make whatever adjustments were appropriate. (*Id.*) And finally, the court properly instructed the jury to disregard any evidence for which an objection was sustained or which the court ordered stricken. (Jury Instruction No. 15, *R. 8621, Vol. 19, p. 3740:12-14.*) **The Wilsons stipulated to each of these instructions.** (*Id.*, pp. 3730, 3895-96.) Since the instructions were not challenged, it is presumed they were properly followed by the jury. *State v. Devey*, 2006 UT App 219, ¶ 16, 138 P.3d 90.

²⁸Of the 89 lines of transcript the Wilsons quote in their argument (*Wilsons' Br. pp. 27-29*), *only seven lines include statements made in front of the jury.* (*Id.*, p. 27) The Wilsons attempt to turn attention from the events of trial and, instead, focus on post-trial motion arguments (*id.*, p. 28-29), which obviously did not affect the jury's verdict. In the end, the Wilsons are left speculating over what the jury must have thought and second-guessing the jury's motives, the jury's thoughts, and the jury's ultimate conclusion. (*Id.*, p. 26) *See also City of Milwaukee v. NL Indus.*, 2008 WI App 181, ¶ 70, 762 N.W.2d 757 ("Here, there is no basis in the record, other than one that calls for speculation, to support the conclusion that the collateral source evidence affected the jury's liability findings.").

893, and *Robinson v. Hreinson*, 409 P.2d 121 (Utah 1965), are irrelevant because they contain no ruling or analysis of prejudice from collateral source evidence admission.²⁹ The four remaining cases are all distinguishable on two fundamental grounds.

First, and most importantly, none of the cited cases involves a circumstance where *the party alleging error offered a stipulation of no out-of-pocket expenses, assented to the procedures followed by the court with respect to collateral source evidence, and solicited collateral source evidence from their own witnesses* as the Wilsons did here.

Second, each of the four cases involves either the admission of collateral source evidence to prove a substantive issue or a circumstance where the court failed to provide an appropriate jury instruction, or both. *Tipton, Eichel, and Robinson* all involve the admission of collateral source evidence to prove a substantive issue. *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34 (1963) (evidence of plaintiff's receipt of Long Shoreman and Harborman's workers compensation benefits admitted to prove plaintiff was not covered under the Jones Act as a "seaman"); *Eichel v. New York Cent. R.R. Co.*, 375 U.S. 253 (1963) (evidence of Railroad Act disability payments admitted to show malingering by plaintiff and lack of motivation to return to work); *Robinson v. All-Star Delivery, Inc.*, 1999 UT 109, 992 P.2d 969 (evidence of disability payment from prior accident offered to show lack of motivation to work). In each of these cases, the evidentiary analysis involved a Rule 403 probative-versus-prejudice analysis weighing the probative value of the

²⁹ Neither *Mahana* nor *Robinson* addresses collateral source evidence issues. *Mahana*, which was a *bench trial*, did not deal with jury prejudice from collateral source evidence, but simply affirmed that bond proceeds received by a plaintiff were a collateral source and properly excluded. *Mahana*, 2004 UT 59, ¶ 47. *Robinson* did not relate to collateral source evidence at all, but rather determined that reference to the *defendant's* insurance to cover a verdict did not affect the adverse outcome to the defendant. *Robinson*, 409 P.2d at 124-25.

collateral source evidence to prove an ultimate issue in the case, or the amount of damages. Because of the Wilsons' stipulations, these cases are divorced from the simple concern present in this appeal -- whether the jury was concerned about the Wilsons obtaining a double recovery.³⁰

In the cited cases where collateral source evidence was determined to improperly reach the jury, the cases specifically note the absence of an appropriate jury instruction. *Tipton*, 375 U.S. at 36 ("The judge did not, however, frame a cautionary instruction . . ."); *Green*, 59 F.3d at 1034 ("[T]he district court here gave no instruction to the jury limiting the use of the disability payments . . .").

In contrast to all of the cited cases, the jury in the instant case was presented with a stipulation *offered by the Wilsons* that there were no out-of-pocket expenses. The jury was then presented with a stipulation by the parties as to the amount of past-medical expenses. And the jury then received a specific instruction informing it that Medicaid and the Wilsons' insurers "have liens entitling them to be reimbursed from any award in this case" and that **"no money will go the plaintiffs until such liens are satisfied."** (Jury Instruction No. 50, *R. 8621, Vol. 19, pp. 3761:22 - 3762:6.*) (emphasis added) In light of these circumstances, there was no risk that the jury would be concerned about a double recovery.³¹

³⁰*Eichel* does not mandate the exclusion of collateral source evidence. See, e.g., *Mcgrath v. Consol. Rail Corp.*, 136 F.3d 838, 841 (1st Cir. 1998) ("We do not read *Eichel* as requiring the per se exclusion of collateral source evidence in FELA cases."). It merely instructs courts to consider the prejudicial potential of collateral source evidence. *Id.*

³¹The Wilsons seek to overturn a jury verdict based on a few snippets of testimony from a trial that included over 3,900 pages of transcript. Of the 28 witnesses who testified, only three - Jared Wilson's father, the Wilsons' life care planner, and the Wilsons' economist - raised what the Wilsons characterize as collateral source concerns. It is against this background that the

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING TESTIMONY FROM JARED'S TREATING PHYSICIANS.

The Wilsons complain broadly about *Barbuto* violations involving Jared's treating physicians without distinguishing between Hospital employed and non-employed physicians, and without clearly specifying the involvement of Hospital employed treating physicians at trial. To be clear, Drs. Glenn, Broadbent and MacArthur were all non-employed, independent physicians represented by separate counsel. (Wilsons' Br. p. 39). Each of these doctors paid settlements to the Wilsons prior to trial. See p. 4 *supra*. Drs. Clark and Minton were Hospital employed treating doctors, *but neither was called by the Hospital to testify at trial*. Dr. Clark was never called to testify at all.³² Dr. Minton was *called by the Wilsons* to testify in their case in chief. When the Hospital tried to call Dr. Minton in its case, the court granted the Wilsons' Motion to Strike based upon alleged *Barbuto* violations.³³ The Wilsons cannot attribute error to the admission of testimony they elicited from Dr. Minton. This leaves only Drs. Stoddard and Boyer. Dr. Stoddard is a Hospital-employed treating physician. Dr. Boyer is not. The two are addressed separately below.

Wilsons must demonstrate that the jury improperly hinged its no-negligence finding on references by the Hospital to a fact stipulated to by the Wilsons: the absence of out-of-pocket expenses.

³²The appeal of this issue as to Dr. Clark is moot. Though the trial court initially ruled that Dr. Clark would be excluded under *Barbuto* (R. 8609, Vol. 7, p. 1299:2-14), and then ruled that Dr. Clark could testify because his care had been placed in issue, (R. 8614, Vol. 12, pp. 2293:9 - 2294:11), *Dr. Clark was never called to testify*.

³³Wilsons' appeal on this issue as to Dr. Minton is also moot. When the Hospital tried to call Dr. Minton as a fact witness, the court excluded him, finding that his treatment was not within the scope of care placed at issue. (R. 8618, Vol. 16, p. 3154:1-16.) The court ruled that an employed physician could meet *ex parte* with counsel only where the employed doctor's care is placed in issue. (R. 8614, Vol. 12, p. 2293:9-16.)

1. ***Barbuto* Does Not Apply to This Case With Respect to the Hospital's Meetings with Its Employee, Dr. Stoddard.**

The Wilsons' 2001 Complaint asserted claims against the "nurses, **agents and employees** of the hospital," alleging that these employees negligently provided medical care (**R. 8, ¶ 25**), and alleged that "Jared Wilson suffered severe personal injuries **during and around the time of his birth.**" (**R. 9, ¶ 4**) (emphasis added). As asserted, these claims covered all the Hospital's employees who cared for Mrs. Wilson and Jared at or near the time of Jared's birth, including Dr. Stoddard.³⁴ Because the Wilsons' Complaint asserted *respondeat superior* liability against the Hospital based on the care given by these employed physicians, the Hospital's counsel was required to meet with Dr. Stoddard to be able to respond to and defend the claims asserted against the Hospital.³⁵

The Wilsons contend that *Sorensen v. Barbuto*, 2008 UT 8, 177 P.3d 614, prohibits a hospital employer from meeting with **its own employed doctors whose allegedly negligent**

³⁴Dr. Stoddard was primarily responsible for Jared's care in the Labor and Delivery suites, as well as in the NICU. Dr. Minton shared in responsibility for Jared's care in the NICU. Dr. Clark cared for Mrs. Wilson during her pregnancy.

³⁵The Wilsons' claims against the Hospital-employed doctors grew more specific as the case progressed. The Wilsons' expert, Dr. Gregory DeVore, opined that Dr. Clark was negligent in his care and treatment of Mrs. Wilson and Jared. (**R. 1365-1368**, Pl.'s Rebuttal Designation of Expert Witness [opining on Dr. Clark's supposed failure to perform and act on antenatal testing]; **R. 8614, Vol. 12, p. 2293:9-22.**) The Wilsons accused Dr. Stoddard of a cover up, claiming that he intentionally failed to obtain a cord blood gas, that he overinflated Jared's Apgar scores, and purposely mis-recorded Jared's condition at birth, all to avoid a malpractice claim. (**R. 8620, Vol. 18, p. 3528:19-24; R. 8621, Vol. 19, pp. 3799:7 - 3800:23.**) Dr. Minton was charged with making misrepresentations about the cause of Jared's condition and the purportedly negligent care given Jared by the Hospital. (**R. 8611, Vol. 9, pp. 1699:21 - 1702:23, p. 1710:13-23.**)

care is asserted as the basis for hospital entity liability under *respondeat superior*. This position presses for a dramatic and entirely unworkable extension of *Barbuto* by transferring the 2008 *Barbuto* decision from the setting in which it arose into a new, strained and completely different context.

Barbuto involved a direct first party claim against a treating physician for breach of the fiduciary duty of patient confidentiality based on the treating physician's disclosure of medical information to the patient's *third-party* adversary. *Id.* ¶ 5. There was no claim of medical malpractice against the treating physician, no claim of *respondeat superior* liability for the physician's care, and neither the treating physician nor his employer had any involvement in the underlying litigation. In *Barbuto* the treating physician voluntarily disclosed confidential patient information to a *third-party* without any issue being raised as to the quality of care provided by that physician.

In sharp contrast to *Barbuto*, this case began with broad allegations of negligent care by the Hospital-employed doctors and nurses and a claim of *respondeat superior* liability against the Hospital. In this setting the Wilsons argue that *Barbuto* should be morphed to hold that employed treating doctors accused of negligence cannot meet with legal counsel without plaintiffs' counsel present - - *even when the employed treating doctor's own care is in issue and even when the hospital is charged with liability for that employed doctor's care.*

The Wilson's argument is contrary to **Utah R. Prof. Conduct 4.2(d)**, which recognizes that employees are automatically represented where their actions may impute liability under *respondeat superior*. **Utah R. Prof. Conduct 4.2(d)** (2009) ("an individual is 'represented' by counsel for the organization" if the individual's "acts or omissions in the matter may be imputed to the organization under applicable law.") The logical application of the Wilsons' argument portends

the denial of attorney-client privilege and meaningful representation to a treating physician accused of negligent care, and the unworkable reality that the employer of a treating physician cannot meet with its own agents to assess a claim and know how to respond.³⁶

Other courts have considered the same issue and recognized that corporate entities must have *ex parte* access to their employed physicians as agents of the Hospital to be able to assess, respond to and defend claims. *Estate of Stephens ex rel. Clark v. Galen Health Care, Inc.*, 911 So. 2d 277 (Fla. App. 2005) (allowing meetings with employed treating doctors to defend wrongful death claim where treating doctors were not sued individually)³⁷; *Morgan v. County of Cook*, 625 N.E.2d

³⁶In rejecting the same extension of *Petrillo v. Syntax Lab., Inc.*, 499 N.E.2d 952 (Ill. App. 1986) (Illinois' equivalent of *Barbuto*) that Wilsons here request of *Barbuto*, the Illinois Supreme Court recognized that hospitals would have no way of determining who the charges were leveled against and would have to risk sanctions, *including the exclusion of its own fact witnesses*, in interviewing doctors and other employees about care given by both nurses and doctors. This is counter-intuitive:

Indeed, accepting plaintiff's interpretation . . . of *Petrillo* . . . would lead to **absurd results**. . . . [H]ospitals would face the dilemma of having to choose between ceasing to communicate with all hospital caregivers with respect to a hospital patient's treatment, communicating only with those caregivers the Hospital assumes were not negligent and risk a subsequent *Petrillo* violation if the Hospital's assumption was incorrect, or deposing all of the patient's hospital caregivers. Further, if we were to accept plaintiff's view, hospitals, which are statutorily obligated to create, maintain and protect private medical records, would be forced to subpoena their own records in the event of litigation. *Burger v. Lutheran Gen. Hosp.*, 759 N.E.2d 533, 555 (Ill. 2001) (emphasis added).

³⁷*Galen Health Care* confronted the same issue presented here: "how to reconcile an employer's right to speak with its employees or agents with a patient's right to nondisclosure of his personal medical information." *Id.* at 281. In upholding the defendants' right to speak informally with their agents in defending against plaintiff's claims, the court reasoned:

Here, [plaintiff] is suing the various corporate entities responsible for managing the Hospital. The corporate entities have no knowledge in and of themselves. They can act only through their employees and agents and should be able to speak to those employees to discuss a pending lawsuit. The [defendants'] attorneys should also be able to speak with the [defendants'] employees and agents as the corporation entities are able to function only through them.

136, 139 (Ill. App. 1993) ("when a patient seeks to hold a hospital vicariously liable for the conduct of a physician employee, the hospital is entitled to speak *ex parte* with that physician."); *Alachua Gen. Hosp., Inc. v. Stewart*, 649 So. 2d 357 (Fla. App. 1995) (where information possessed by physician employees is imputed to the Hospital, the Hospital "should be able to thoroughly investigate the type of care that is being provided in its hospital, especially if it is alleged that the care was not meeting acceptable standards.")

In distinguishing *Barbuto* from this case, it is important to note that **communications between a defendant corporation and its employed physicians are not patient confidentiality breaches to a third party as was the case in *Barbuto***. Indeed, the corporate entity is being held liable for the information the employed treating physician possesses and thus, "information would flow freely within the confines of the employer/employee relationship." *Galen Health Care*, 911 So. 2d at 282. This reasoning is echoed in *Burger*, 759 N.E.2d at 555 (distinguishing intra-hospital communications from third-party disclosures).

The Wilsons' requested application of *Barbuto* to the Hospital's attorney meetings with Dr. Stoddard³⁸ should be rejected, along with the Wilsons' related claims of error.³⁹

Id. at 282.

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The Wilsons argue in passing that Dr. Stoddard gave inappropriate expert testimony on causation because he was not disclosed as an expert witness. (*Wilsons' Br.* p. 41) All of Jared's treating physicians were identified as individuals who may offer expert opinions at trial. (*R.* 718, Pl.'s Designation of Expert Witnesses; 912-913, UVRMC's Designation of Expert Witnesses.) The Wilsons themselves listed Dr. Stoddard as a fact witness from whom they might elicit expert opinions. (*R.* 6663-6665, Pl.'s Designation of Trial Witnesses.) Under *Boice ex rel. Boice v. Marble*, 1999 UT 71, 982 P.2d 565, parties who expressly reserve in their expert designations the right to "call as experts any of [plaintiff's] treating physicians," may question such treating physicians in their areas of expertise. *Id.* ¶ 12. The Wilsons cannot claim prejudice where Dr. Stoddard's opinions were limited to issues raised in the medical record, and certainly not where they

2. The Wilsons Waived Any Claim of Prejudice under *Barbuto* with Respect to ALL Employed Physicians.

The Hospital's counsel represented each of the employed physicians at their depositions years before the trial began *without objection from the Wilsons*. (R. 8611, Vol. 9, p. 1627:1-12.) When Drs. Stoddard and Minton were deposed on June 19, 2003, Ms. Bott represented them without objection. (*Id.*) When Dr. Clark was deposed on February 13, 2004, Ms. Bott also represented him without objection. (*Id.*) The Wilsons waited almost 5 years after the obvious and open representation of these employed physicians until the 2008 trial to contend that the law was violated by the Hospital's counsel's meeting with and representing these employed physicians. The Wilson waived any right to object by silently consenting for five years to the Hospital's counsel's representation of each of the employed physicians.⁴⁰

designated Dr. Stoddard just as the Hospital did and where the trial court expressly found that they "opened the door" to causation testimony. (R. 8620, Vol. 18, pp. 3541:15 - 3542:17.)

³⁹On appeal, the Wilsons express incredulity that the Hospital continued to meet with Dr. Stoddard during trial. (Wilson's Br. p. 40) Yet the Wilsons' counsel acknowledged on the record that such meetings were specifically sanctioned under the trial court's ruling on the Wilsons' motion. (R. 8618, Vol. 16, pp. 3162:17 - 3163:8.)

⁴⁰Further, the Wilsons used *Barbuto* as both a sword and a shield. For example, the Wilsons themselves called Drs. Boyer, Minton, and Stoddard in their case in chief and aggressively examined them regarding their contacts with the Hospital's counsel. (R. 8614, Vol. 12, pp. 2450-52; R. 8611, Vol. 9, p. 1555:10-22, pp. 1710:24 - 1711:15.) The Wilsons also examined Dr. Boyer on the *Barbuto* and *DeBry* decisions, which were marked as exhibits during his testimony (R. 8615, Vol. 13, pp. 2561-69), and then incorporated into the jury instructions. (R. 8621, Vol. 19, pp. 3754-55.) However, when the Hospital tried to call Dr. Minton, the Wilsons successfully moved to exclude him based on *Barbuto*. (R. 8618, Vol. 16, p. 3154: 8-16.)

3. **The Hospital's 2003 *Ex Parte* Meeting with Non-Employed Treating Physician Dr. Boyer Was Reasonably Understood as Proper at the Time, Dr. Boyer's Addendum of His February 2003 MRI Report Was Entirely Consistent with Prior Evaluations, the Court Allowed the Wilsons' Counsel to Attack Dr. Boyer's Ethics for Holding the Meeting, and the Court Properly Took Judicial Notice of Judge Stott's April 10, 2000 Order Expressly Permitting Such *Ex Parte* Meetings.**

In April 2003, Dr. Boyer met with the Hospital's counsel and prepared an Addendum to his February 2003 MRI report rendering it consistent with prior readings. During trial and now on appeal the Wilsons have levied a sensational attack against Dr. Boyer (a non-employed treating physician), accusing him in front of the jury of engaging in behavior which is "unethical, illegal and dishonest" (R. 8614, Vol. 12, p. 2450:16-20) and of being "shameless" (R. 8615, Vol. 13, p. 2559:12-15) in knowingly engaging in an illegal conspiracy to manipulate evidence for \$200. In reality, the meeting was reasonably understood as proper when it occurred. *The Wilsons called Dr. Boyer as a witness* and then aggressively attacked Dr. Boyer as shameless and unethical, even though his addendum was consistent with his own and other prior imaging reports.⁴¹

⁴¹Dr. Boyer read or approved readings of Jared's CT and MRI scans at Primary Children's Medical Center. Ms. Bott met with Dr. Boyer in April 2003 after the Hospital subpoenaed copies of Jared's CT and MRI scans. Jared's February 3, 2003 MRI report approved by Dr. Boyer did not mention cortical dysplasia despite the presence of that finding on earlier reports prepared by Dr. Boyer and George W. Nixon, M.D, both of whom are pediatric neuroradiologists at Primary Children's. (R. 7121, J3419 (5/28/96 CT Brain), J3421 (11/11/96 CT Brain).) Dr. Boyer amended the February 3, 2003 report to include the earlier findings. (R. 8614, Vol. 12, p. 2459:22-24.) He also reviewed the films with two of his colleagues, Drs. Moore and Hedland, who also identified cortical dysplasia on the films. (R. 8615, Vol. 13, pp. 2551:22-24, p. 2552:1-4.) Dr. Boyer billed \$200 for his professional time in meeting with Ms. Bott. (R. 8614, Vol. 12, p. 2456:11-16.)

- a. Dr. Boyer's April 2003 Meeting with the Hospital's Counsel Was Reasonably Understood as Appropriate at the Time.

The trial court correctly found that the meeting with Dr. Boyer "**was not inappropriate . . . [g]iven the authorities of the time.**" (R. 8600, 10/8/08 Pretrial Hr'g, p. 148:13-15) (emphasis added). Lawyers and physicians in March 2000 were guided by the **Utah State Bar Ethics Advisory Opinion Committee, Op. No. 99-03 (1999)**, which stated: "No ethical rule prohibits *ex parte* contact with plaintiff's treating physician when plaintiff's physical condition is at issue."⁴² This Ethics Opinion was consistent with Utah's statute and evidentiary rule regarding privilege. **Utah R. Evid. 506; Utah Code Ann. § 78-24-8(4) (2000) (renumbered § 78B-1-137)**. Counsel and Dr. Boyer were entitled to rely upon this body of law in April 2003 when the subject meeting took place. The Utah Court of Appeals decision in *Sorensen v. Barbuto*, 2006 UT App 340, 143 P.3d 295, was not issued until August of 2006, more than three years after the subject meeting, and was then affirmed on *certiorari* by this Court in February 2008.

The Wilsons incorrectly contend that the March 9, 2000 Court of Appeals decision in *Debry v. Goates*, 2000 UT App 58, 999 P.2d 582, *distinguished on other grounds*, *Staley v. Jolles*, 2010 UT 19, ¶¶ 26-27, --- P.3d --- (Mar. 26, 2010), is a basis to charge Dr. Boyer with bad faith and purposeful illegal conduct. *Debry's* holding that a mental health therapist should not voluntarily provide an affidavit to a patient's adversary regarding his patient's mental state in a divorce action to influence an alimony award did not put the Hospital's counsel or Dr. Boyer on notice that the April 2003 meeting was improper under Utah law. To the contrary, the still-in-force specific Ethics Advisory

⁴²This bar opinion was in effect until February 1, 2008, when it was vacated by this Court in the *Sorensen v. Barbuto* decision. 2008 UT 8, ¶¶ 26-28.

Opinion sanctioned such a meeting, and a trial court order issued *after Debry*, in a case where the Hospital's attorney in this case (Ms. Bott) was counsel, assured that *ex parte* communications **were expressly permitted, and even encouraged, if plaintiff's care was at issue.** (R. 8103-8105, Order of Judge Gary D. Stott, Ex. 5 to Mem. in Opp'n to Pl.'s M. for New Trial.)⁴³

The Wilsons' position that *Debry* covered the situation present here is defied by the Utah Court of Appeals *Barbuto* decision issued in March 2006, three years after the subject meeting, which acknowledged that *Debry* was only then being extended to cover *ex parte* meetings with treating physicians in the context of this case. *Sorensen*, 2006 UT App 340, ¶ 15 ("*Debry* did not explicitly state that a physician's *ex parte* communication with the opposing side constitutes a breach of confidentiality, its reasoning readily leads to such a conclusion."). The April 2003 meeting was reasonably understood as appropriate under the state of the law at the time. (R. 8600, 10/8/08 Pretrial Hr'g, p. 148:13-15.)

- b. The Wilsons Called Dr. Boyer as a Witness and the Court Permitted the Wilsons' Counsel to Attack Dr. Boyer's Ethics Even Though the Meeting was Justifiably Understood as Appropriate Based on the Law at the Time and Even Though His Addendum was Consistent with Prior Imaging Studies.

The Wilsons chose to call Dr. Boyer as part of their case in chief. In that setting, and in spite of the court's ruling that the April 2003 meeting **"was not inappropriate . . . [g]iven the authorities of the time"** (R. 8600 (emphasis added)), the trial court permitted the Wilsons' counsel to assault

⁴³The court took judicial notice of Judge Stott's Order, which was issued on April 10, 2000, one month after *Debry*, in response to plaintiffs' efforts to prohibit defense counsel contact with treating physicians. The order states: "To the extent that health care providers may want to visit with the defendants or their counsel, they are permitted to do so. And, the plaintiffs or their attorneys will do nothing to interfere with that communication." (*Id.*)

Dr. Boyer's integrity and ethics, accusing Dr. Boyer time after time on direct examination of being "unethical, illegal and dishonest" in maliciously and dishonestly meeting in violation of the law for \$200. (R. 8614, Vol. 12, pp. 2450:16 - 2460:8.) Then, Wilsons' counsel opened re-direct by accusing both Dr. Boyer and the Hospital's counsel, Ms. Bott, of being "shameless." (R. 8615, Vol. 13, p. 2559:12-15 ["Q: Doctor, you and Ms. Bott are shameless, aren't you? This is shameless. You are shameless aren't you?"].)

In response to these assaults, Dr. Boyer testified that his 2003 addendum was entirely consistent with a November, 11, 1996 imaging report prepared years before any litigation was filed (R. 8614, Vol. 12, pp. 2500:20 - 2501:24 ["Q. Was cortical dysplasia a new finding? A. No, it wasn't."]), with the evaluation of another physician, Dr. Nixon, in 1996, also years before litigation was filed (R. 8615, Vol. 13, pp. 2554:17 - 2555:1 ["Q. So how many times had cortical dysplasia been identified or suspected prior to the . . . February 2003 report? . . . Actually, three times, Dr. Nixon read two CTs, and mentioned it in both of his reports as I did in mine."]), and with the consultative evaluations of Drs. Moore and Hedlund in 2005. (R. 8615, Vol. 13, pp. 2551:22 - 2552:4.)⁴⁴

⁴⁴The Wilsons allege Dr. Boyer changed medical records in other cases. With regard to the *Butterfield v. Sevier Valley Hospital* case, no such amendment was made. The case involved brain damage caused by a perinatal stroke. Dr. Boyer submitted an affidavit interpreting an existing medical record. (R. 8614, Vol. 12, pp. 2476:1 - 2477:8.) The Wilsons' counsel in this case had no involvement in the *Butterfield* case.

- c. Judge Stott's April 10, 2000 Post-*Debry* Order Was Appropriately Admitted to Defend the Assault on Dr. Boyer and Ms. Bott Related to the April 2003 Meeting.

The Wilsons assert the court committed reversible error by taking judicial notice of an order issued on April 10, 2000 by Fourth District Court Judge Gary Stott specifically finding that *ex parte* meetings with treating physicians were permitted. (R. 7121, Tr. Ex. D-263 (J. Stott's Order).)⁴⁵

"A court shall take judicial notice if requested by a party and supplied with the necessary information." Utah R. Evid. 201(d). A trial court's decision to admit evidence under Rule 201 is reviewed for abuse of discretion. *Riche v. Riche*, 784 P.2d 465, 468 (Utah Ct. App. 1989). "[N]otice may be taken of the record of another case" so long as the record is "offered in evidence by a party, or so stated by the trial court, so that it will be known to [the parties] what is being relied on." *Carter v. Carter*, 563 P.2d 177, 178 (Utah 1977).

Though the Hospital moved to preclude the Wilsons from insinuating that Dr. Boyer acted improperly (R. 4683), the request was denied and the court allowed the Wilsons to attack Dr. Boyer as engaging in behavior that was "unethical, illegal and dishonest." (R. 8614, Vol. 12, p. 2450:16-20.) Dr. Boyer explained that he agreed to meet with the Hospital's counsel because he had been advised by a number of attorneys that when a plaintiff put his or her medical condition at issue, the law allowed him to meet with the attorneys from both sides. (R. 8614, Vol. 12, pp. 2494:25 - 2495:5.) The court appropriately took judicial notice of Judge Stott's 2000 Order after

⁴⁵The court took judicial notice of this order at the same time it took judicial notice of Utah Code Ann. § 78B-1-137 (waiving patient confidentiality when medical condition placed in issue in litigation) (R. 8615, Vol. 13, p. 2520:15-17, p. 2525: 23-24) and allowed this statute to be argued to the jury, to which the Wilsons raised no objection.

the Wilsons' counsel argued extensively with Dr. Boyer about his understanding of the law at the time of the 2003 meeting and accused both Dr. Boyer and Ms. Bott of being "shameless" in that meeting. (R. 7121, Tr. Ex. D-263 (J. Stott's Order); R. 8615, Vol. 13, pp. 2519-28). Judge Stott's Order was introduced not to argue the law to the jury as suggested by the Wilsons, but instead, as the court explained when admitting the Order, because it bore on the "factual issue" of what Dr. Boyer reasonably believed the law to be at the time. (R. 8615, Vol. 13, p. 2527, p. 2599:10-11.) *The Order is relevant because it speaks to the reasonableness of Dr. Boyer's understanding of the law, which the Wilsons chose to attack as baseless and in bad faith.*⁴⁶

d. Jury Instruction No. 39 (the *Barbuto* Instruction) Was Given in Error.

For purposes of its cross-appeal, and only if an error is found requiring remand, the Hospital asserts the court erred in giving part of Jury Instruction No. 39. The last paragraph of Jury Instruction No. 39 states:

A physician has the duty to protect their patient's confidential information. *Since at least March 2000, Utah law has required a physician to notify his patient before disclosing confidential records or communications to the patient's adversary in litigation.*

(R. 8621, Vol. 19, p. 3755:8-15 (emphasis added); see also *id.*, pp. 3730-31 (preserving exceptions until after instructing the jury).) The Hospital objected to the last paragraph of Instruction No. 39. (*Id.*, p. 3897:16-24.) Jury instructions are reviewed for correctness, "granting the trial court

⁴⁶Further, the Wilsons cannot claim error where their counsel proceeded to mark as exhibits and discuss extensively with Dr. Boyer the facts and reasoning of the *Barbuto* and *Debry* cases. (R. 8615, Vol. 13, pp. 2561-69.) The Wilsons had every opportunity to meet, explain, or answer the Order. *Carter*, 563 P.2d at 178. The court did not abuse its discretion and the Wilsons have failed to demonstrate how this alleged error would have altered the jury's verdict given their own discussion of the law with Dr. Boyer. Any error is harmless. *Larsen*, 958 P.2d at 958.

no deference on its view of the law." *Billings*, 918 P.2d at 466.

As noted above, the jury heard testimony that the Hospital's counsel met with Dr. Boyer in April 2003. (R. 8614, Vol. 12, p. 2450:16-20; R. 8615, Vol. 13, pp. 2559:12 - 2561:19, pp. 2591:22 - 2592:16.) Based on Instruction 39, Plaintiffs' counsel argued in closing that the April 2003 meeting with Dr. Boyer was prohibited by Utah law. (R. 8621, Vol. 19, pp. 3805:19 - 3806:2.) Both the instruction and argument are incorrect as a matter of law for the reasons set forth in Section II.B.3(a)-(c), *supra*.

4. Dr. Boyer's Testimony Did Not Affect the Verdict Because the Jury Never Reached Causation and Any Error with Respect to Dr. Boyer was Harmless.

The jury in this case reached a verdict of **no negligence**, finding that the Hospital's care providers acted within the standard of care. The Wilsons recognize that Dr. Boyer's testimony **related only to causation - - a question the jury never reached.**⁴⁷ (Wilsons' Br. p. 41) This issue is thus mooted by the jury's finding of no negligence. See *Alarid v. Am. Appliance Mfg., Inc.*, 2002 UT App 376, 2002 WL 31600260 (refusing to reach causation in case alleging defective design of hot water heater where jury found the product was not defective).⁴⁸ As a result, any perceived error is harmless. See *Larsen*, 958 P.2d at 958.

⁴⁷Dr. Boyer's reading of the February 21, 2003 MRI concluded that Jared had cortical dysplasia, a condition which develops in the first and second trimester of pregnancy, thus further disconnecting Jared's injury from events at or near the time of his birth. (R. 8615, Vol. 13, p. 2547:1-15.)

⁴⁸"[U]npublished decisions of the Court of Appeals issued on or after October 1, 1998, may be cited as precedent in all courts of the State." *Utah R. App. P. 30(f)*.

C. THE COURT PROPERLY EXCLUDED PART OF DR. HYDE'S TESTIMONY BECAUSE HE WAS NOT QUALIFIED UNDER RULE 702 AND BECAUSE HIS OPINIONS WERE IRRELEVANT, UNNECESSARY AND CUMULATIVE.

The trial court "is allowed considerable latitude of discretion in the admissibility of expert testimony, and in the absence of a clear showing of abuse, this court will not reverse." *Stevensen v. Goodson*, 924 P.2d 339, 347 (Utah 1996). The Wilsons designated Dr. Hyde as a purported expert to testify about Intermountain's market share for the purpose of generically suggesting that all defense witnesses were incapable of testifying truthfully because Intermountain is institutionally corrupt and exercises dominating control over everyone associated with it. The court correctly excluded this "expert" testimony on the grounds that Dr. Hyde was not qualified under Utah R. Evid. 702, and then permitted the Wilsons the opportunity to show individual grounds for bias with each individual witness based on their own particular circumstances.

1. The Court Properly Exercised Its Gatekeeper Function to Exclude Part of Dr. Hyde's Testimony Under Rule 702.

Dr. Hyde testified at trial. (R. 8613, Vol. 11, pp. 2121 - 2170.) However, with regard to a portion of Dr. Hyde's proposed testimony, the court properly exercised its assigned "gatekeeper responsibility to screen out unreliable expert testimony." *Utah R. Evid. 702 advisory committee's note* (requiring court to "confront the proposed expert testimony with rational skepticism."). Specifically, Dr. Hyde lacked foundation to opine as to Intermountain's alleged influence over witnesses and his theories offered no scientific reliability.

Dr. Hyde testified in deposition that "I had no occasion prior to being retained in this case to have studied Intermountain Health Care." (R. 5315, UVRMC's Mem. Supp. M. Strike, R. 5288:22-24, Ex. A to Mem.) When questioned about his background, Dr. Hyde admitted

"there are no specific issues that I would point to as being analogous between former positions and circumstances of this case" (*Id.*, R. 5309, R. 5275:4-8.) When questioned whether he was qualified to testify regarding a hospital misusing its power to intimidate witnesses, he said, "Do I know that this doctor or that doctor has been intimidated by any action of the defendants? **No, I'm not – I'm not qualified to, nor have I looked into that.**" (*Id.*, R. 5249:3-4) (emphasis added).

Dr. Hyde's proposed opinions are also not scientifically reliable or reliably applied to the facts. *Utah R. Evid.* 702(b). He never researched Intermountain before being retained to testify in this case. (*Id.*, R. 5315, R. 5288:22-24.) Most of Dr. Hyde's information came from the Wilsons' counsel (*id.*, R. 5285:22 - R. 5283:11), and based on this, Hyde opines: "[Intermountain] is known to me as the largest and most powerful hospital network, not only in this country but possibly in the world." (*Id.*, R. 5310, R. 5290:21-24.) These bold opinions were uniquely developed for this case, were not based on independent research, and are incapable of peer review. Thus, Dr. Hyde was properly excluded under Rule 702. *Minasian v. Standard Chartered Bank, PLC*, 109 F.3d 1212, 1216 (7th Cir. 1997) (exclusion proper where opinions "full of vigorous assertion . . . carefully tailored to support plaintiffs' position but devoid of analysis.").

2. Rather than Allowing Dr. Hyde's Collateral Side-Show, the Court Permitted the Wilsons to Attack the Bias of Each Witness Individually.

The court correctly excluded that part of Dr. Hyde's testimony that involved "a large collateral discussion which is not directly focused on the specific medical care of the Wilsons, but on the nature and character of the hospital defendant." (R. 8603, 10/28/08 Pretrial Hr'g, p. 317:21-24.) A detour into Intermountain's tax exempt status, its community relations, its

market concentration, and its relations with doctors and nurses in the community was designed only to prejudice the jury against an institution on matters irrelevant to the care provided by the Hospital in this case.⁴⁹ Rather than permitting Dr. Hyde's unqualified generalizations, the trial court allowed the Wilsons to attack bias of individual witnesses based on their particular financial or other ties to Intermountain. (*See, e.g.*, R. 8611, Vol. 9, pp. 1689:14 - 1693:7 [Dr. Minton];⁵⁰ R. 8614, Vol. 12, pp. 2449:6 - 2450:4 [Dr. Boyer].)⁵¹ The Wilsons' counsel also offered his view of Intermountain's market power and its impact on witnesses in closing argument. (R. 8621, Vol. 19, pp. 3771:1 - 3774:4.)

The trial court's discretion in excluding Dr. Hyde under Rule 702 and allowing the Wilsons to probe bias of individual witnesses was correctly exercised.

III. THE CUMULATIVE ERROR DOCTRINE IS INAPPLICABLE.

Reversal is not warranted under the cumulative error doctrine unless "the cumulative effect of the several errors undermines [this Court's] confidence . . . that a fair trial was held."

Utah Chapter of Sierra Club v. Air Quality Bd., 2009 UT 76, ¶ 54, 644 Utah Adv. Rep. 27 (errors

⁴⁹The trial court has considerable discretion in determining relevance and in weighing Dr. Hyde's peripheral probative value against time constraints and cumulative evidence concerns. *Larsen*, 958 P.2d at 956 (relevance); *State v. Vigil*, 922 P.2d 15, 27-28 (Utah Ct. App. 1996) (403 ruling must be "beyond the limits of reasonability."). Dr. Hyde was also properly excluded under Rules 402 and 403.

⁵⁰During his examination of Dr. Minton, Wilsons' counsel was allowed to ask Dr. Minton if he was paid nearly \$800,000 from Intermountain in 2002, and if Intermountain could terminate Dr. Minton without cause if it gives him 90 days notice. (R. 8611, Vol. 9, pp. 1689:14 - 1693:7.)

⁵¹Wilson's counsel was allowed to challenge Dr. Boyer's bias by asserting that 95% of his business comes through Primary Children's Medical Center. (R. 8614, Vol. 12, pp. 2449:6 - 2450:10.)

alleged did not go to fairness of trial and therefore did not implicate cumulative error doctrine); *State v. Kohl*, 2000 UT 35, ¶ 25, 999 P.2d 7 (claimed errors either not errors or so minor as to result in no harm and therefore no relief under cumulative error doctrine). The Wilsons have raised only a single assertion of error related to the jury's verdict of no negligence (exclusion of nurse modules). As argued above, the modules were correctly excluded. The other evidentiary issues raised on appeal neither relate to the jury's verdict, nor are they meritorious. Even if one or more of these alleged errors are recognized, none determined the outcome and are harmless when considered in context. *Utah R. Civ. P.* 61; *Utah R. Evid.* 103(a). The cumulative error doctrine is therefore inapplicable.

IV. THE COURT ERRED IN TAXING COSTS AGAINST JARED, AS OPPOSED TO HIS PARENTS, AND COSTS FOR TRIAL TRANSCRIPTS SHOULD NOW BE AWARDED.

A. COSTS SHOULD BE TAXED AGAINST THE WILSONS UNDER RULE 54(D).

For purposes of its cross appeal, the Hospital asserts the trial court erred in taxing costs against Jared, as opposed to his parents. (*R. 8452-8458*, Ruling Re: Def. IHC's M. for Costs; *R. 8499-8501*, Ruling Re: Pl.'s Obj. to Prop. Order Re: Costs and Req. for Clarification; *R. 8502-8505*, Order Granting in Part and Denying in Part UVRMC's Verified Mem. of Costs; *R. 8594-8598*, Ruling Re: Pl.'s Obj. to Order and Req. for Clarification.) Whether costs may be assessed against parents who have initiated lawsuits on behalf of their minor children is a question of law, reviewed for correctness. *Madsen*, 2008 UT 69, ¶ 19.

Rule 54(d) provides that "costs shall be allowed as of course to the prevailing party." The rule contains no exceptions precluding cost awards against *guardians ad litem*. Some states have enacted statutes to address this issue. *See, e.g., Peterson v. Skiles*, 113 N.W.2d 628, 637 (Neb. 1962)

(Nebraska statute holding next friend liable for costs); *U.S. Fid. & Guar. Co. v. Henderson*, 55 S.W.2d 639, 639 (Tex. Civ. App. 1932) (same under Texas statute). Utah has not.

Where no statutory enactment immunizes a *guardian ad litem* from liability for costs, a *guardian ad litem* that is not subject to the control of the court should be subject to costs just as any other litigant who institutes an unsuccessful lawsuit.⁵² After all: "He it is who brings the suit into being. Without him, it would not exist. Without him, the defendant would not be put to costs." *Fisher v. Bell*, 63 S.E. 620, 620 (W. Va. 1909). Indeed, "[a]ny other rule would subject parties to the mercy of immature infants and irresponsible persons instituting suits on their behalf." *Id.*

Rule 54(d) allows prevailing defendants like the Hospital to recoup a small fraction of their litigation expenses from the parties responsible for initiating and pursuing unsuccessful lawsuits. It is improper to allow parents who instigate lawsuits on behalf of their minor children, to circumvent the proscriptions of Rule 54(d) solely upon the semantics in the caption of their

⁵²This is not a case where the court appointed a disinterested third-party to represent Jared's interests. In such a case, where the *guardian ad litem* is subject to the court's control, the assessment of costs could be inequitable and could discourage disinterested parties from assisting the courts. See *U.S. Fid. & Guar.*, 55 S.W.2d at 639 ("[A] guardian ad litem is not chargeable personally with the costs of the suit taxed against his ward . . . because his connection with the case is imposed by order of the court") In contrast, Jared's parents brought and vigorously pursued suit, only attempting to minimize their role once the Hospital sought its mandatory costs. At trial, the Wilsons sought to recover "past medical expenses **they have incurred** on Jared Wilson's behalf [and] [a]ny future medical expenses **they will incur** on his behalf." (R. 8602, Vol. 1, p. 292:5-9 (Jury Instruction No. 1).) (emphasis added) Those damages can only be recovered in Utah by the minor plaintiff's parents, not the minor plaintiff or the *guardian ad litem*. See *Ostertag v. La Mont*, 339 P.2d 1022, 1026 (Utah 1959). Finally, in settlement with other defendants below, the Wilsons settled "**individually** and as parents and guardians of Jared Wilson, a minor" (R. 8506-8511, Settlement Agreement) (emphasis added). The Wilsons clearly had something to gain by bringing this lawsuit and, like every other plaintiff under Rule 54(d), the Wilsons had something to lose by bringing this lawsuit.

complaint and their claims for relief. Unsuccessful plaintiffs should not escape their cost obligations based on artful pleading.⁵³

B. THE HOSPITAL CAN RECOVER THE COSTS FOR TRIAL TRANSCRIPTS USED ON APPEAL.

The Hospital sought the costs of trial transcripts, upon which the Wilsons, the Hospital and the court relied during trial. (R. 7588-7592) The court acknowledged the convenience of the daily transcripts - both to parties and to the court - but denied costs for the transcripts because the parties had the "option of utilizing the audio recording system." (R. 8454) Plaintiffs have resurrected this issue by appealing the underlying judgment. A litigant who pays for daily trial transcripts is entitled to recover its costs for those transcripts as a cost on appeal where the non-prevailing party in the trial court uses the transcripts on appeal. *Highland Constr. Co. v. Union Pac. R.R. Co.*, 683 P.2d 1042, 1052 (Utah 1984); *Utah R. App. P. 34(c)*.

⁵³As mentioned in note 1 *supra*, though it is not identified in the Wilsons' Statement of Issues, the Wilsons contend the court erred in awarding costs because the Hospital's cost application was untimely. (Wilsons' Br. p. 46) *Utah R. Civ. P. 54(d)(2)* requires a party claiming costs to serve and file a memorandum of costs "within five days after the entry of judgment." The Hospital's Memorandum of Costs was served and filed on December 26, 2008. (R. 7588-7592) Judgment was not entered until January 8, 2009. (R. 7632-7634) The Hospital's cost application was early and therefore timely. The Wilsons incorrectly contend that the Order entered on December 9, 2008 is really a "judgment" and should therefore have triggered the five-day deadline. (Wilsons' Br. p. 46) Rule 54 refers expressly to "entry of judgment," not "order." "Orders" and "judgments" are distinct legal animals, governed by distinct rules. *Utah R. Civ. P. 7, 54 and 58A*. Different procedures must be followed to obtain entry of orders and judgments. *Id.* And orders and judgments have different effects and consequences when entered. *Utah R. Civ. P. 7 and 58A*. The two are not synonymous. The Wilsons cite no authority for their position and the trial court correctly rejected the Wilsons' argument. (R. 8452-8458)

V. THE TRIAL COURT ERRED IN ALLOWING THE DISCOVERY AND ADMISSION OF THE HOSPITAL'S PRIVILEGED NEONATAL MORBIDITY AND MORTALITY STATISTICS.

For purposes of its cross appeal, and raised only if an error is found requiring remand, the Hospital asserts that the court erred in allowing Plaintiffs to discover and introduce the Hospital's neonatal morbidity and mortality statistics. Plaintiffs used and referred to the statistics throughout trial and in closing argument. (*See, e.g.*, R. 8608, Vol. 6, pp. 1215:18 - 1220:22; R. 8610, Vol. 8, pp. 1476-1505; R. 8621, Vol. 19, pp. 3884:24 - 3885:2.) Whether the statistics are statutorily privileged is a question of law reviewed for correctness. *Cannon*, 2005 UT App 352, ¶ 7.⁵⁴

Utah Code Ann. § 26-25-1 (2004) provides that data relating to the condition and treatment of any person may be gathered for the "study and advancing [of] medical research, with the purpose of reducing the incidence of disease, morbidity or mortality." Under Utah Code Ann. § 26-25-3,

all information, interviews, reports, statements memoranda, or other data furnished by reason of [Chapter 25], and any findings or conclusions resulting from those studies *are privileged communications and are not subject to discovery, use or receipt in evidence in any legal proceeding of any kind or character.*

(emphasis added) Production of privileged material is a criminal offense. *Id.* § 26-25-5(1).⁵⁵

⁵⁴The trial court first denied Plaintiffs' Motion to Compel and ruled the statistics were privileged. (R. 1458-1465) The court subsequently granted Plaintiffs' Motion for Reconsideration, based upon *Cannon*, and ordered an *in camera* review of the Hospital's privilege log. (R. 6507-6510, 10/24/2008 Ruling.) On October 30, 2008, the court ruled, over the Hospital's continued objection, the statistics were discoverable. (R. 8605, Vol. 4, pp. 689:24 - 692:16.)

⁵⁵The *Cannon* court defined the interests the privilege is designed to protect: "The Hospital has a legitimate interest in protecting reports under the care review privilege in order to ensure an open exchange of accurate information between personnel and administrators in

Dr. Minton testified the statistics are gathered to "figure out what we're doing right. We use those as peer review, quality improvement, quality assurance, . . . in order to give feedback to physicians and to staff." (R. 1253: 21-24, Exhibit C to UVRMC's Mem. Opp'n to Pl.'s Second M. to Compel Disc.) Dr. Stoddard testified the statistics are used to "gauge our performance with those of other hospitals and find out if there is significant variation." (*Id.*, R. 1257:10-12.) These statistics are compiled and provided to an in-house staff committee for use in medical research to reduce the incidence of disease, morbidity, and mortality. It is precisely the sort of information contemplated and protected by Utah Code Ann. § 26-25-1(1), (3). The trial court erred in ruling the statistics were not privileged and admissible.⁵⁶

CONCLUSION

Based on the foregoing discussion and argument, the Wilsons' appeal should be denied and the verdict of the jury affirmed. The trial court's discretion was not abused with respect to any of the evidentiary issues challenged. Moreover, *the Wilsons' appeal raises no challenge with respect*

order to improve the effectiveness of studies, evaluations, and any measures implemented to improve hospitals and the quality of the health care they provide. That interest is aligned with the very purpose behind the care review privilege to improve medical care by allowing health-care personnel to reduce morbidity or mortality and to provide information to evaluate and improve hospital health care." *Cannon*, 2005 UT App 352, ¶ 22 (internal citations omitted).

⁵⁶*Cannon* does not alter this conclusion. It stands for the proposition that a court must have an adequate evidentiary basis upon which to make the privilege determination. *Cannon*, 2005 UT App 352, ¶¶ 18-21. In *Cannon*, the trial court found that documents were privileged solely on the basis of an affidavit that tracked the statutory language in conclusory terms. It did not conduct an *in camera* review. The Court of Appeals reversed and remanded, ordering the trial court to review the documents *in camera*. *Id.* *Cannon* is distinguishable. Here, the trial court had deposition testimony of doctors, elicited under cross-examination, that specifically identified the categories of information collected and the purposes to be served by the data. Beyond that, the trial court conducted an *in camera* review. That is not the error ascribed. Here the court erred in concluding the documents were not privileged and in allowing their admission once the review was complete.

to the sufficiency of evidence to support the jury's verdict of no negligence, thereby conceding the sufficiency of such evidence to support the verdict.

With respect to its cross-appeal, the Hospital also requests that this Court direct that costs are properly taxed against Jerome and Leilani Wilson as plaintiffs, including an award of costs associated with trial transcripts.

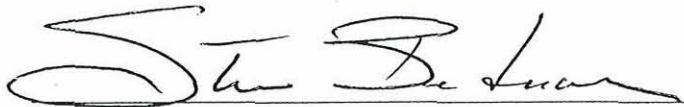
The Wilsons' Brief requests not only that the jury's verdict be vacated, but also asks this Court to extend extraordinary affirmative relief on remand in the form of sanctions, including striking the Hospital's causation defense, the preclusion of the Hospital physician-employee witnesses, disqualification of the Hospital's counsel and imposition of costs associated with the need for a new trial based on evidentiary errors by the trial court. These extreme requests for affirmative relieve are unprecedented and unwarranted. The affirmative relief requested should be entirely beyond consideration in any circumstance where trial court evidentiary rulings require a new trial, and especially in the context where an appellant has invited and contributed to the errors alleged, such as with respect to the introduction of collateral source evidence, and where the trial court has both found no misconduct on the part of and ruled in favor of the appellee. Punishing a party for erroneous trial court rulings should not be considered, and the Wilsons' invitation to treat the parties as unequal under the law should be disregarded. (Wilsons' Br. p. 47 ¶(d) (suggesting only institutional parties be subject to requested sanctions).)

In the event any issue raised on appeal requires remand, the Hospital requests that this Court's order (1) specifically affirm the propriety of testimony from Jared's treating physicians who are or were employees of the Hospital, including Drs. Clark, Stoddard and Minton and the propriety of such employed-physicians *ex parte* meetings with counsel for the Hospital; (2) direct

the withdrawal of Jury Instruction 39 and prohibition of any similar instruction; and (3) rule that the Hospital's neonatal and morbidity and mortality statistics are within the aegis of Utah Code Ann. § 26-25-1.

DATED this 14th day of April, 2010.

MANNING, CURTIS, BRADSHAW & BEDNAR, LLC

A handwritten signature in black ink, appearing to read "Steven C. Bednar", written over a horizontal line.

Steven C. Bednar
JoAnn E. Bott
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Hospitals Inc. dba Utah Valley Regional Medical Center*

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of April, 2010, I caused to be served in the manner indicated below two true and correct copies of **BRIEF OF DEFENDANT-APPELLEE AND CROSS-APPELLANT IHC HOSPITALS, INC., dba UTAH VALLEY REGIONAL MEDICAL CENTER** upon the following:

<input type="checkbox"/> VIA FACSIMILE <input checked="" type="checkbox"/> VIA HAND DELIVERY <input type="checkbox"/> VIA U.S. MAIL <input type="checkbox"/> VIA FEDERAL EXPRESS <input type="checkbox"/> VIA EMAIL	Roger P. Christensen Scott T. Evans CHRISTENSEN & JENSEN, PC 15 W. South Temple, Suite 800 Salt Lake City, UT 84101 <i>Attorney for Plaintiffs</i>
<input checked="" type="checkbox"/> VIA FACSIMILE <input type="checkbox"/> VIA HAND DELIVERY <input type="checkbox"/> VIA U.S. MAIL <input type="checkbox"/> VIA FEDERAL EXPRESS <input type="checkbox"/> VIA EMAIL	Joseph W. Steele STEELE & BIGGS 5664 Green Street Salt Lake City, UT 84123 <i>Attorney for Plaintiffs</i>



ADDENDUM

PART I

Trial Exhibits

PART II

Selected Excerpts from Trial Transcripts

-Testimony Regarding Premature Infants' Vulnerability to Brain Bleeds (Dr. Ronald Stoddard)

-References to Collateral Source Benefits, The Parties' Stipulations, Arguments, Ruling and Collateral Source Jury Instructions

-Excerpts from Dr. Boyer's Testimony

PART III

Utah Valley Regional Medical Center's Supplemental Response to Plaintiffs' Request for Production of Documents