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KYLIE LEE Plaintiff/Appellant vs. KENNETH WILLIAMS, and MOAB FAMILY MEDICINE, Defendants/Appellees : Brief of Appellant

Utah Court of Appeals

220

IN THE UTAH COURT OF APPEALS

KYLIE LEE Plaintiff / Appellant vs. KENNETH WILLIAMS, and MOAB FAMILY MEDICINE, Defendants / Appellees	**BRIEF OF PLAINTIFF-APPELLATE** Case No. 20160198-CA Oral Argument Requested

Appeal from the Judgment of the Seventh Judicial District Court,
Grand County
The Honorable Lyle R. Anderson, District Court Judge, Presiding
District Court Case No. 130700019

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JURISDICTIONAL STATEMENT

The Utah Court of Appeals has jurisdiction over this matter pursuant to sections 78A-4-103(2)(j) of the Utah Code.

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

Issue I: Whether the trial court erred in concluding that Mrs. Lee knew of Dr. Williams' negligence in March of 2009 when disputed issues of fact existed about when she learned of her injury.

A. Standard of Review: This is an appeal from Summary Judgment. The standard of review is a non-deferential review for correctness considering all facts and inferences in the light most favorable to the non-moving party and considering whether the court correctly applied the law and correctly concluded that no disputed issues of 6material fact existed. *Roth v. Joseph*, 2010 UT App 332, ¶ 13, 244 P.3d 391; *Arnold v. White*, 2012 UT 61, ¶ 11, 289 P.3d 449; *Gowe v. Intermountain Healthcare, Inc.*, 2015 UT App 105, ¶ 3, 356 P.3d 683. Additionally, Defendants have the burden of proof to establish that the statute of limitations bars plaintiff's claim. *Seale v. Gowans*, 923 P.2d 1361, 1363 (Utah 1996).

B. Preservation of Issue: Plaintiff properly preserved this error by responding to the motion for summary judgment with facts indicating a dispute about this matter (R.527-29) filing her *Motion for Correction of the Record*, (R.1446-59), which motion considered (R.2410-50) and ruled against by the trial court. R.2425, 2447, 2450-51.

Issue II: Were the instructions given to the jury regarding "the discovery rule" an accurate statement of the law when the given instruction fails to comport with both current case law and the Model Utah Jury Instruction on the issue?

A. Standard of Review: When appealing an improper jury instruction submitted at the trial level, the standard of review is non-deferential correction of error. *State v. Dozah*, 2016 UT App 13, ¶¶ 12-13. Reversal is required if confidence in the jury verdict is undermined due to the improper instruction. *Turner v. University of Utah Hospitals & Clinics*, 2013 UT 52, ¶ 17, 310 P.3d 1212.

B. Preservation of Issue: This issue was preserved for review in the trial court. R.2243-45.

Issue III: Did Mrs. Lee receive a fair and impartial jury when one of the jurors that was ultimately empaneled: (1) had a personal relationship with Defendants and (2) had a personal relationship with one of Defenses' witnesses?

A. Standard of Review: When appealing the fairness and impartiality of an empaneled Jury, the standard of review is abuse of discretion regarding whether the juror(s) at issue should have been dismissed for cause. *State v. Maestas*, 2012 UT 46, ¶ 41, 299 P.3d 892. A party is entitled to a new trial if successful in demonstrating that challenged juror(s) was biased as a matter of law. *Turner v. University of Utah Hospitals & Clinics*, 2013 UT 52, ¶ 32, 310 P.3d 1212.

B. Preservation of Issue: This issue was preserved for review in the trial court. R.2649-57.

Issue IV: Did the trial court err in excluding evidence of Dr. Williams' treatment of Mrs. Lee's pregnancy on the basis that such evidence was not relevant to the statute of limitations portion of the bifurcated trial, when that evidence was germane to whether and/or when Mrs. Lee knew or should have known she had sustained a "legal injury"?

A. Standard of Review: When appealing from a lower court's ruling as to the admissibility of evidence, the standard of review is abuse of discretion which can be demonstrated by showing that the court relied on an erroneous conclusion of law or that there was no evidentiary basis for the ruling. *Daniels v. Gamma West Brachytherapy, LLC*, 2009 UT 66, ¶ 32, 221 P.3d 256. A party must show a reasonable likelihood that a different result would have been reached in the absence of the error. *Lawrence v. Mountainstar Healthcare*, 2014 UT App 40, ¶¶ 15-16, 320 P.3d 1037.

B. Preservation of Error: This issue was preserved for review in arguments made to the trial court. R.2475-95.

Issue V. Did the court err in failing to consider a remedy to Defense counsel's engaging in *ex parte* communications with Mrs. Lee's non-party health care provider when Utah law prohibits such communications?

A. Standard of Review: The permissibility of defense counsel's *ex parte* meetings with a plaintiff's treating physicians requires interpretation of previous decisions. *Wilson v. IHC Hosp., Inc.*, 2012 UT 43, ¶24, 289 P.3d 369, 379 (Utah 2012). The interpretation of precedent is a question of law that is reviewed for correctness. *Id.*

B. Preservation of Error: This issue was preserved for review in the trial court. R.2744.

CONSTITUTIONAL OR STATUTORY PROVISIONS

Utah Code § 78B-3-404(1) provides, "A malpractice action against a health care provider shall be commenced within two years after the plaintiff or the patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs, but not to exceed four years after the date of the alleged act, omission, neglect, or occurrence."

Rule 47(f) of the Utah Rules of Civil Procedure states in relevant part,

> A challenge for cause is an objection to a particular juror and shall be heard and determined by the court. The juror challenged and any other person may be examined as a witness on the hearing of such challenge. A challenge for cause may be taken on one or more of the following grounds. On its own motion the court may remove a juror upon the same grounds. …(6) Conduct, responses, and state of mind or other circumstances that reasonably lead the court to conclude the juror is not likely to act impartially. No person may serve as a juror, if challenged, unless the judge is convinced the juror can and will act impartially and fairly.

Other relevant statutory provisions are set forth in the body of the brief or in the Addendum.

STATEMENT OF THE CASE

Nature of the Case

This is a medical malpractice case in which Plaintiff, Kylie Beddoes Lee, sued Dr. Williams and Moab Family Medicine (hereinafter "Defendants") for failing to advise her of the need to receive a RhoGAM shot at the appropriate time in pregnancy. Such failure led to her becoming unnecessarily sensitized to the D-antigen. Her sensitization caused

significant problems with her subsequent pregnancy and will continue to cause significant problems in future pregnancies. R.1-11.

Defendants moved for summary judgment which included a statute of limitations defense as found in Utah Code § 78B-3-404(1) on the basis that Mrs. Lee knew of or should have discovered her injury within two years from the date of her treatment at the hands of Defendants. R.338-59.

Mrs. Lee implicated "the discovery rule" as it related to Defendants' raising of their statute of limitation defense and asserted that she did not discover her "legal injury" until 2012 and that her filing of the suit was therefore timely for statutory purposes.

A trial was held and the jury ruled against Mrs. Lee on the single question presented to them by the trial court: "Do you find that Defendants have established, by a preponderance of the evidence, that Kylie Lee knew or should have known, by September 27, 2010, that she might have suffered an injury?" R.2288. The judgment on the jury verdict was entered on February 17, 2016. R.2329-31.

Lee filed a timely notice of appeal in the trial court on March 10, 2016; and she appeals from several decisions made by the trial court, both prior to and during trial.

Course of Proceedings

Defendants raised a statute of limitations defense pursuant to section 78B-3-404(1) of the Utah Code, arguing that Mrs. Lee knew or should have known of her injury of becoming sensitized to the D-antigen prior to expiration of the two-year statute and that her claims were consequently time-barred. R.31, R.351-56. Defendants filed a Motion for Summary Judgment on that basis and Mrs. Lee opposed the motion. The trial court

denied the motion but not before ruling as a matter of law that Mrs. Lee knew Defendants might have been negligent no later than March of 2009. Such finding was paradoxical given that in the same Memorandum Order, the court conceded that there were "so many hotly contested factual issues connected with the statute of limitations defense".

After the trial court denied the motion for summary judgment in regards to the statute of limitations, but concluded that Mrs. Lee knew of Defendant's negligence in March of 2009, Plaintiff filed a motion for correction of the record to clarify the Court's ruling on the motion for summary judgment. R.771-72; 1346-59, 2355 *et al.*

A hearing was held on the Motion for Correction of the Record. R.2183, *2406 et al.* The trial court considered the motion as well as Mrs. Lee's allegations of fact. Thereafter the trial court made a finding that Mrs. Lee knew of Dr. Williams' alleged negligence in March of 2009 thereby essentially granting partial summary judgment for Defendant. *Id.,* R.2450-51. The court concluded that Mrs. Lee knew of Defendants' alleged negligence in 2009. R.2450-51.

The trial court ultimately bifurcated the trial so that the only question to be decided by the jury was when Mrs. Lee discovered or should have discovered "she might be injured". R.921, 926-27, 2288. The court also denied Mrs. Lee from presenting Defendants' medical records evidencing their treatment of Mrs. Lee during the relative timeframe.

During jury selection, the majority of potential jurors admitted that they either: (1) were or had been patients of the defendant Moab Family Medicine, (2) had family members who were patients at Moab Family Medicine, or (3) knew Dr. Williams or other

doctors[TY1]/owners at the clinic Mrs. Lee was suing. Over Mrs. Lee's objection a juror who should have been stricken for cause served on the jury and participated in the verdict. R.2649-57, 2268, 2288.

The trial court ultimately bifurcated the trial so that the only question to be decided by the jury was when Mrs. Lee discovered or should have discovered "she might be injured". The court also prohibited Mrs. Lee from presenting Defendants' medical records evidencing their treatment of Mrs. Lee during the relative timeframe.

Because the trial court had previously found as a matter of law that Mrs. Lee knew of Defendants' possible negligence no later than March 2009, the only question presented to the jury was if Mrs. Lee knew or should have known by September 27, 2010 that she "might have suffered an injury". Mrs. Lee objected to such instruction as being an inaccurate statement of the law. The jury answered, "Yes," and Mrs. Lee's case was dismissed with Dr. Williams and Moab Family Medicine being awarded their costs. This appeal followed.

STATEMENT OF FACTS

General Background Facts

In 2008, 18 year-old Kylie[TY2] Beddoes (now Kylie Lee) became pregnant and presented to Dr. Kenneth Williams for her first prenatal visit on June 23, 2008. R.662, 791. Dr. Williams is an employee and partner of Moab Family Medicine, P.C. R.2858. After receiving results from a blood test conducted on Mrs. Lee, Dr. Williams recognized that Mrs. Lee's blood tested as "Rh-negative". R.2894.

To be Rh-negative means that a patient's red blood cells do not carry a particular antigen known as the "D-antigen". R.589, 2860-2864. If an Rh-negative woman's blood mixes with a fetus' cells that are Rh-positive, the woman's body has an antibody response. R.2860-2866. This response is often called "sensitized to the D antigen" or "D-sensitized." Once a person is sensitized to the D antigen the person will always be sensitized to the D antigen. R.2893-94. Mrs. Lee's sensitization to the D antigen (also termed "Rh-sensitization" or "Rh-sensitized")[1] is the injury at issue in this case. R.2891-93. Rh-sensitization is an asymptomatic injury until a pregnant woman's fetus exhibits problems from the sensitization. R.2891.

When presented with a pregnant patient who is Rh-negative (or any woman with a negative blood type), a doctor's concern is that the developing fetus has red blood cells that are Rh-*positive*. R.1549. As the fetus is developing under such conditions, if blood from the fetus migrates into the blood stream of the mother, the mother may develop antibodies (R. 2865) that fight the fetus' foreign blood cells. R.392. Once the mother produces such antibodies, she is known as being "sensitized to the D antigen" (R.2866, 2892) or, said another way, Rh-sensitized. R.2865-66. Once a woman is sensitized to the D antigen, any of the mother's fetuses are at risk of miscarriage and other potentially devastating consequences. R.2880.

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[1] Throughout the record Mrs. Lee's injury was referred to as different things that mean the same thing. The different terms used for her injury are: "D-Sensitization", "sensitization to the D antigen", "Rh-sensitization", and "sensitized". For purposes of simplicity Appellant will generally refer to Mrs. Lee's injury as "Rh-sensitization".

To prevent a mother from becoming Rh-sensitized and to avoid injury to current and future pregnancies, Doctors administer an injectable drug called RhoGAM. R.2893-94. The injection is to be given twice: once around the 26-week gestation mark and again upon delivery. R.703-04, 2759. Proper administration of the drug almost always (99.8% of the time) prevents the mother's red blood cells from producing those antibodies that are dangerous to the fetus. R.395. In other words, the drug is intended to prevent Rh-sensitization, i.e., it is prophylactic. R.2893, 2894.

In these circumstances, when a woman with an Rh-negative blood type is treated by Dr. Williams as her primary physician it is his responsibility (R.463) to order one injection of the drug RhoGAM during the 26 to 28 week gestation period, and then a second injection post-partum. R.703-04, 2759. It is Mrs. Lee's position that Dr. Williams was negligent because he did not order the first of the two RhoGAM injections. R.007. It was undisputed that Mrs. Lee received the post-partum RhoGAM injection. R.0824. However, Mrs. Lee did not receive the first injection during the 26 week time period. R.432. She became Rh-sensitized during the pregnancy treated by Dr. Williams . R.2894. Once a patient becomes completely sensitized and the body has already learned to produce the antibody, RhoGAM does not cure sensitization (R.2894) becomes completely useless as to the current and all future pregnancies. R.471, 504.

Facts related to the trial court's conclusion that Mrs. Lee knew of Dr. Williams' alleged negligence in March of 2009.

Prior to her first pregnancy, Mrs. Lee was not sensitized to the D-antigen. R.2894. Though Dr. Williams claims that it is "probable" that he ordered and told Mrs. Lee to get

her 26 week RhoGAM shot (R.477), no such order appears in any of Dr. Williams' records. R.469, 477.[2] Dr. Williams does not have a specific memory of ordering the 26 week RhoGAM shot for Mrs. Lee. R.464-65, 683. He also agrees that he can not say for certain that he actually ordered the shot. R.477. On December 30, 2008, Mrs. Lee gave birth to her first child, Chilton. R.2883, 2790. Dr. Williams' records indicate that by this time, he suspected (R.2918, 2923) Mrs. Lee had become Rh-sensitized given he could find no evidence of having ordered an initial RhoGAM shot, and because a blood test indicated she had developed antibodies (yet the blood test did not say which antibodies, and it specifically did not mention the D antigen or Rh sensitization). R.495 . The same records show that she received a post-partum RhoGAM injection nonetheless. R.736. Mrs. Lee testified that the nurse who administered the RhoGAM shot indicated that the shot was necessary because she was Rh-negative and that she would need the shot for all future pregnancies. R.2947-48. At no point does Mrs. Lee indicate she was told that she had *already* become Rh-sensitized and that this injection was therefore useless.

Dr. Williams claims to have informed Mrs. Lee on December 31, 2009, that he informed Mrs. Lee of her sensitization/injury (R.392-94); however, the record that confirmed D sensitization was not available to Dr. Williams until January 5, 2009 when he received the lab results. R.2925, 2918, 2931. With the exception of the discharge summary dated January 1, 2009, Dr. Williams' records for both Mrs. Lee and her son Chilton are absent any discussion of her sensitization/injury. R.2920. At no time is her

[2] Dr. Williams admits that is was "possible" he didn't order the test because there was no written record for the order. He was simply relying on his proclaimed habit.

sensitization referenced in her "medical history" or any other portion of Dr. Williams' records that memorialized the nearly 10 visits that followed the January 5, 2009 test result. R.2920.

The January 1, 2009, record also contains what Plaintiff believes are self-serving misstatements by Dr. Williams. For example, the record indicated that Mrs. Lee did not receive RhoGAM "despite having been ordered". R.714, 736. In fact, however, there was no evidence in the medical records that RhoGAM was ever ordered for Mrs. Lee prior to the delivery of Chilton. Yet, this statement was redacted from the January 1 record and Plaintiff was not permitted to point out this misrepresentation to the jury. R.2539-40. Plaintiff argued this record evidences Dr. Williams' misrepresentations in the January 1 record about informing plaintiff of her injury as well as his motive to conceal the truth from her. R.2555.

Mrs. Lee admits to researching "Rh-negative blood factors" or "RhoGAM" on the Internet in March of 2009 (about two months after Chilton's birth) and it was at that time she first became aware that she should perhaps have had a pre-natal RhoGAM in addition to the post-partum injection she actually received. R.2785-86. Furthermore, Mrs. Lee was only 19 years old at the time she would have performed such "research". R.2944. Mrs. Lee maintains that at no time prior to or after the nurse's injection was she told that she had *already* become Rh-sensitized due to not receiving the first injection because she would have remember being told that she was sensitized/injured. R.2778-86. Dr. Williams testified that even if Kylie would have studied the matter on the internet, and realized she did not receive RhoGAM during her pregnancy, she would have also

probably learned that her likelihood of becoming sensitized in such a case was a mere 1%. R.2906-08.

Mrs. Lee again became pregnant later in 2009 and would make the incredibly difficult decision of having an abortion. R.1453. Records from the Planned Parenthood clinic that performed the procedure indicate that she was again tested for being Rh-negative and that staff at the facility administered a RhoGAM injection. R.520-521. Again, however, there was nothing in the Planned Parenthood record to indicate that Mrs. Lee knew she had already become sensitized. *Id.*

In early 2011, Mrs. Lee became pregnant a third time and received prenatal care from Dr. Steven Dewey. R.2970. Mrs. Lee never gave Dr. Dewey any indication that she knew she had an understanding of RH sensitization or the problems associated with that, and she never said anything to him about Rh sensitization. R.2971-72, 2976-77. Dr. Dewey stated that Mrs. Lee never mentioned her sensitization if she knew about it. R.506. Mrs. Lee gave birth to her second child, Bryson, on December 16, 2011. R.528. Bryson was born with complications requiring blood transfusions. R.528. It was at this time that Mrs. Lee was informed she had developed the antibodies RhoGAM was designed to prevent. R.528. Dr. Dewey, admitted that he thought he made an error by failing to test Mrs. Lee for Rh-sensitization. R.504. She claims that Dr. Dewey then informed her of her injury. R.528. Believing that Bryson's complications were due to Dr. Dewey's neglect, Mrs. Lee sought an attorney for purposes of investigating claims against Dr. Dewey. R.528-29. It was only after her attorney researched the matter and discovered that Mrs. Lee had already become completely sensitized during her first

pregnancy in 2008, that it became clear for the first time to Mrs. Lee that: (1) she was injured and (2) Dr. Williams' neglect in 2008 (not Dr. Dewey's in 2011) might have caused the injury. R.528-29. Mrs. Lee commenced this action against Dr. Williams on September 27, 2012. R.658.

In response to suit, Defendants' raised the affirmative defense that Mrs. Lee's claims were untimely under the applicable two-year statute of limitations. R.23-33. Prior to trial, Defendants filed a Motion for Summary Judgment on the matter. R.338-59. On April 21, 2015, the court ruled against Defendants' Motion (R.762-66) but not before finding as a matter of law that Mrs. Lee knew Dr. Williams' "might have been negligent" in March of 2009 when she "researched" the matter on the Internet. R.763. The trial court came to this conclusion despite also conceding that "there are so many hotly contested factual issues connected with the statute of limitations defense. . . .". R.765. Believing to have disposed of one of the key questions of whether or not Mrs. Lee might have known Dr. Williams was negligent, the court frames the remaining issue as simply "whether Lee knew *she might have been injured* by the alleged negligence. . . ." R.763, *emphasis added.* This anomalous and un-cited standard of "might have been injured" would serve to infect the entirety of the trial up to and including the jury instruction on the matter. R.2284.

Facts relating to the Jury Instruction

Prior to the start of the now bifurcated trial, the trial court instructed the parties to submit proposed jury instructions. Over Mrs. Lee's objection that such misstated the law, (R.2243-45), the court accepted and ultimately submitted the following instruction as it

related to the Statute of Limitations and discovery rule issues: "Discovery of an injury from medical malpractice occurs when an ordinary person through reasonable diligence knows or should know that she *might have* sustained an injury." R.2284, *emphasis added.* The ultimate question presented to the jury was: "Do you find that Defendants have established, by a preponderance of the evidence, that Kylie Lee knew or should have known, by September 27, 2010, that she *might have suffered* an injury." R.2330. (*emphasis added*). Mrs. Lee also objected to this ultimate question on the basis that it too misstated the law. R.2284. The jury ultimately answered, "Yes" to the question. R.2330.

Facts related to Medical Records That Suggested Dr. Williams Negligence

It was in the final paragraph of the trial court's Memorandum Opinion dated April 21, 2015, that the court first suggests that judicial economy might be served if the trial were bifurcated, though the trial court conceded at that time that it had not determined whether bifurcation was warranted. R.765. Apparently taking the hint, Defendants moved for bifurcation between the Statute of Limitations defense and the ultimate question of Defendants' negligence. R.731-39. Mrs. Lee objected on the basis that judicial economy would not be served because, given the elements that must be proved under "the discovery rule", she would necessarily have to present some evidence of negligence at any bifurcated proceeding. R.842-47. The court, citing to its Memorandum Opinion, and believing it had disposed of the need to prove whether and when Mrs. Lee knew Dr. Williams' might have been negligent, granted bifurcation of the trial. R.926-927. The court further refused to allow Mrs. Lee to present any evidence

regarding Defendants' negligence including certain medical records that were germane to whether or not Mrs. Lee knew or should have known she was "legally injured". R.2450-241, 2475-95.

Specifically, Dr. Williams produced no medical records during Mrs. Lee's pregnancy that indicated that he had ordered the 26-week RhoGAM for her.

Yet, Mrs. Lee's discharge summary from Allen Memorial Hospital dated January 1, 2009 included the following statement: She did miss her 26-week RhoGAM, which is quite unfortunate and despite having been ordered. R.736.

Based on the trial court's ruling that no evidence of Dr. Williams' negligence would be admitted, the parties stipulated to a version of the January 1, 2009 discharge summary being admitted without the sentence indicating that the 26-week RhoGAM shot had been ordered for Kylie. Defendants' Trail Exhibit 6. (This exhibit was not given page number for the record on appeal but is included in the attached addendum.)

Facts related to Jury Selection

During jury selection, a majority of the jury panel had a relationship with the Williams' and the Moab Family Clinic, either as patients themselves or concerning family members. R.2580-680. Juror #26, K.H., admitted to knowing nurse C.W. through scouting activities R.2652. Juror 26's wife had been a patient of Dr. Williams' wife at Moab Family Medicine. R.2652-53. Lee challenged K.H. (#26) for cause because of the relationship he and his wife had with the Williams and the clinic, and because he had a relationship with witness Nurse C.W. and her son. R.2652-53. The trial court denied the

motion to strike and K.H. sat on the jury. R.2268, 2657. Plaintiff used all of her peremptory challenges during jury selection. R.2268.

Facts related to Ex-Parte Communication

Nurse C.W., one of Defendants' non-party witnesses R.2655, treated Plaintiff during and after her pregnancy at issue. R.2655. During Defendants' direct examination of Nurse C.W., Plaintiff's counsel noticed that the testimony sounded unusually well "rehearsed". R.2724. Suspicious, Plaintiff's counsel requested to take the witness on *voir dire* to inquire whether this witness had improper *ex parte* communications with defense counsel prior to trial. *Id.* Upon examination, nurse C.W. admitted to speaking with defense counsel the night prior to trial (R.2740) and without the presence of Plaintiff's counsel. R.2740-43. The witness further admitted that it was defense counsel who called her. R.2740-43. Although Nurse C.W. denied discussing Plaintiff's medical treatments or records (R.2743), she admitted to discussing her testimony with Defendants' counsel *ex parte*. R.2740-2743.

Plaintiff objected to Nurse C.W's testimony generally citing *Barbuto* and *Wilson* which prohibit such communications. R.2724. Plaintiff then requested that the witness be struck. R.2724. The trial court, after conducting no research on the validity of Plaintiff's objections, denied Plaintiff's objection and stated "[y]ou're so far of the reservation with this argument I'm not even going to listen to it. It can't possibly be the law that she can't testify about the doctor's habit because she has at one point treated the plaintiff." R.2744. Plaintiff clarified that it was not that the witness could not testify, but that Nurse C.W. had had *ex parte* communication with Defendants' counsel without Mrs.

Lee's knowledge and consent. R.2744. However, the Court refused to find any impropriety despite the communications being patently illegal. R.2744-45. The trial court concluded, "you are so far away from that there that I don't know why we're even spending time on it." R.2744-45.

Nurse C.W. testified that she had heard Defendant Williams thoroughly explain injuries to other patients inferring that he must have done so with Plaintiff. R.2746-47. Plaintiff believes that Nurse C.W's character testimony played a significant role in the jury's determination about whether to believe that Dr. Williams informed Plaintiff of her injury prior to September of 2010 arguably triggering the statute of limitations.[3]

SUMMARY OF ARGUMENTS

The trial court's legal conclusion that Mrs. Lee Knew of Dr. Williams' negligence in March of 2009.

The trial court concluded as a matter of law that Plaintiff knew of Dr. Williams' alleged negligence in March of 2009. However, the trial court ignored genuine issues of material fact disputing when Plaintiff actually learned of Dr. Williams' negligence. Evidence was presented that Plaintiff learned of her injury and Dr. Williams' alleged negligence in 2012 after the delivery of her second son.

Additionally, it was legally impossible for plaintiff to have discovered Dr. Williams' alleged negligence before Mrs. Lee knew or should have she was injured.

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[3] Although juror bias is addressed in another argument in this brief, juror 26, K.H., admitted knowing Nurse C.W. and meeting her through their children's scouting activities which Plaintiff believes adds to the prejudice of not granting a sanction after Nurse C.W.'s *ex parte* communications with Defense counsel.

Thus, because there were questions of fact about when Mrs. Lee learned of her injury, and because Mrs. Lee presented evidence that there was a second event which she believed could have caused her injury, there necessarily were questions of fact about when (1) when Mrs. Lee learned she was Rh-sensitized/injured; (2) when Mrs. Lee discovered Dr. Williams' negligence/fault as well as (3) when she learned which event caused her injury.

Jury Instruction Issue

The jury instruction used by the court stated that the applicable standard in determining when the statute of limitations is triggered was simply whether plaintiff knew or should have known that she "might have sustained an injury". Such instruction was in error for two reasons. First, case law repeatedly states that a plaintiff must have knowledge of a tangible and *actual* injury—not a possible or even probable injury. By using the phrase "might be injured", the court implied to the jury that knowledge of a *possible* injury is sufficient to trigger the statute of limitations. In this case, while there was evidence suggesting Mrs. Lee may have known of legal injury as far back as March of 2009, there was evidence that Mrs. Lee did not learn of her *actual* and manifest injury until after the birth of her second child. Had the jury deliberated under the proper instruction, it is highly likely they would have come to a different conclusion on the statute of limitations issue.

Second, the jury instruction and ultimate question failed to include two additional and required elements that (1) the plaintiff know or should know both the cause of the injury as well as (2) the possibility of the provider's fault in causing the injury. The

court's failure was obvious error given the fact that proving each and every element under the rule, by preponderance of the evidence, was the Defendants' burden. Therefore the court improperly absolved the defense from having to meet their burden of proof as to all three elements and confidence in the verdict is undermined due to the improper instruction and jury question.

Jury Selection Issue

Mrs. Lee asserts she was denied her right to a fair and impartial jury. She challenged a juror for cause due to an existing relationship he had with the Defendants and with a defense witness that was disclosed during *voir dire*. These relationships created a presumption of partiality/bias that required the juror be stricken for cause unless further investigation by the court revealed evidence to rebut that inference. Here, the trial court failed to so investigate and thus failed to insure a fair trial for Lee. Accordingly, he abused his discretion and a new trial is required.

Evidence Admission Issue

Prior to trial, Mrs. Lee opposed Defendants' Motion *in limine* seeking to exclude evidence that tended to disprove Dr. Williams' assertion that he informed Mrs. Lee of her injury on December 31, 2008, thus beginning the limitations period. The first such evidence was a "Discharge Summary" apparently generated on that date, in which Dr. Williams states in part:

> I reviewed my standard postpartum teaching. She is Rh negative with positive antibody screen. We discussed the potential for future miscarriages due to her positive antibody screen. She did receive a RhoGAM. As noted her fetal blood screen was negative. *She did miss her*

26-week RhoGAM, which is quite unfortunate and despite having been ordered.

(*emphasis added*). The court however, only allowed Plaintiff to introduce this record with the emphasized portion redacted.

The second piece of evidence Plaintiff was prevented to introduce was. Dr. Williams' own admission that nowhere in any of his treatment records was such an order found. Thus, Dr. Williams' admissions directly contradicted the redacted statement. This contradiction calls into dispute not only whether Dr. Williams ever ordered the prenatal RhoGAM shot as he indicated in the full text of the "Discharge Summary", but more importantly to the statute of limitations question, whether Dr. Williams' was being truthful when he claims to have informed Mrs. Lee of her injury on December 31, 2008. Plaintiff believes had this evidence been introduced, the jury would likely have inferred: (1) Dr. Williams was attempting to conceal his negligence when he created the January 1 record; and (2) that he did not inform Mrs. Lee of her injury that day.

***Ex Parte* Communication Issue**

Defense counsel met with a non-party treating health care provider of Mrs. Lee prior to calling that provider as a witness at trial. This *ex parte* meeting violated the healthcare fiduciary duty of confidentiality to Mrs. Lee and breached her right to privacy. Furthermore, it violated Utah law under prior appellate decisions. The trial court refused to see this violation and refused to hold an appropriate hearing on this issue. The trial court's failure to act resulted in a continued breach of privacy to Lee, prejudiced her at trial, and accordingly, requires a sanction or remedy for this violation by defense counsel.

The only reasonable and appropriate remedy at this stage is a new trial followed by remand and further hearing on the matter.

ARGUMENT

I. The trial court erred in concluding that Mrs. Lee Knew of Dr. Williams' negligence in March of 2009.

a. There were genuine issues of fact about when Mrs. Lee learned of Dr. Williams Negligence/Fault.

The trial court denied Defendants motion for summary judgment in regards to the statute of limitation. R.762-65, 771-72. At the close of arguments on the summary judgment motion the trial court stated, "I really thought it would be clear to me at the end of our argument whether, what I should do. It's still not clear. I'll read these cases to see if I can come up with a decision... but I just think it's a very gnarly issue, so I'll do the best I can with it." R.2397. This sentiment was echoed in the written ruling, stating in part, "there are so many hotly contested factual issues connected with the statute of limitations defense." R.765. Nonetheless, the trial court after further consideration and argument by the parties interpreted his ruling to be that Lee has "admitted that in March of 2009, she did this research, and I have said in my ruling clearly, she knew he might have been negligent at that point." R.2425.

Summary judgment is appropriate when "(1) 'there is no genuine issue as to any material fact' and (2) 'the moving party is entitled to a judgment as a matter of law.'" *Poteet v. White,* 147 P.3d 439, 441 (Utah 2006). Since the Court does not resolve issues of fact, it must "consider the record as a whole," viewing "all facts and fair inferences

drawn from the record in the light most favorable to the nonmoving party." *Id.* In ruling on a motion for summary judgment, a trial court may consider, together with the affidavits filed, the pleadings, depositions, answers to interrogatories, and admissions on file." Utah R. Civ. P. 56(c). *Guardian State Bank v. Humpherys*, 762 P.2d 1084, 1087 (Utah 1988).

Under the Utah Health Care Malpractice Act, "a patient has discovered her injury only when she has discovered her 'legal injury—that is, both the fact of injury *and* that it resulted from negligence.'" *Arnold v. White*, 2012 UT 61, ¶15, 289 P.3d 449 (quoting *Daniels v. Gamma West Brachytherapy, LLC*, 2009 UT 66, ¶1, 221 P.3d 256); see also *Seale v. Gowans*, 923 P.2d 1361, 1363 (Utah 1996) ("the two-year limitations period does not commence to run until the injured person knew or should have known that he sustained an injury and that the injury was caused by negligent action"); and *Foil v. Ballinger*, 601 P.2d 144, 148 (Utah 1979) (We "hold that the term discovery of 'injury'... means discovery of injury and the negligence which resulted in the injury."). This discovery of the legal injury occurs "'when a plaintiff first has actual or constructive knowledge of the relevant facts forming the basis of the cause of action.' Accordingly... without more, neither (1) the existence of symptoms, (2) a suspicion that a doctor's negligence caused medical complication, nor (3) the commencement of an investigation is sufficient to trigger the statute of limitations." *Id.* at ¶16 (quoting *Russell Packard Dev., Inc. v. Carson*, 2005 UT 14, ¶22, 108 P.3d 741).

Of critical importance here is this third factor. In his initial ruling on summary judgment the trial court denied the Defendants motion for summary judgment as to the

statute of limitations. R.762-65. In that ruling, the trial court properly set forth some of the disputed facts present as to the discovery of Mrs. Lee's legal injury. Yet when confusion arose, he subsequently interpreted his ruling to be that because Lee "admitted that in March of 2009 she did this [internet] research" on RhoGAM, she, therefore, "knew [Williams] might have been negligent at that point." R.2450-51. This conclusion effectively partially granted the defense motion for summary judgment. Mrs. Lee asserts the trial court erred in this second ruling.

Mrs. Lee asserts that her simple internet research was done only to satisfy curiosity about the RhoGAM shot the nurse administered after Chilton's birth. R.1470-71. Mrs. Lee asserts that it does not even rise to the level of "the commencement of investigation" discussed by the Utah Supreme Court in *Arnold*. Nonetheless, even if it is investigative, this sole act—as relied upon the trial court—is insufficient to trigger the statute of limitations. One, because at the time this research was done, Lee claims she did not know she had an injury. Two, "a plaintiff's initiation of an investigation to determine whether her injury was the result of negligence is insufficient to trigger the statute of limitations. Such an investigation, by its nature, indicates that the plaintiff has not yet discovered that her 'injury... resulted from negligence,' and has thus not yet discovered her legal injury." *Arnold*, 2012 UT12 at ¶20 (quoting *Daniels*, 2009 UT 66, ¶1, 221 P.3d 256).

Moreover, this Court should consider all the facts and those facts do not support the trial court's ultimate ruling on summary judgment in regards to the statute of limitations.

Here, Mrs. Lee claims that it was not until after a pregnancy in 2011-2012, and a similar subsequent event (a physician's failure to order RhoGAM) that she learned of her Rh-sensitization/injury. R.527-29.

Dr. Williams is alleged to have negligently failed to order a prenatal RhoGAM shot for Plaintiff in 2008 during his treatment of Mrs. Lee's first pregnancy. R.001-008. Similarly, Mrs. Lee's treating physician for a subsequent pregnancy, Dr. Dewey, admitted that he thought he made a mistake by failing to order the blood screen which would have resulted in Mrs. Lee receiving a RhoGAM. R.504. Mrs. Lee claims that she first learned she was injured after a conversation with Dr. Dewey in 2012. R.527-29. Mrs. Lee originally thought it was Dr. Dewey's failure to order RhoGAM that caused her Rh-sensitization/injury. R.527-29. However, she learned of Dr. Williams' negligence in 2012 after she hired counsel, counsel collected Dr. Williams' records, and counsel informed her that it was Dr. William's negligence that caused her Rh-sensitization/injury. *Id.*

Drawing all inferences in a light most favorable to Mrs. Lee, the non-moving party, the jury could have determined that Mrs. Lee did not learn of Dr. Williams negligence/fault until 2012. Therefore, the trial court erred when it did not conclude that there were issues of fact about when Plaintiff learned of Dr. Williams' negligence/fault.

Accordingly, the trial court erred in granting partial summary judgment. This is true because as set forth in his initial ruling, there are genuine issues of material facts as to Mrs. Lee's discovery of her legal injury, which was negligence and the injury. It was likewise error for the trial court to rely only on Mrs. Lee's minimal internet research to

determine her knowledge of negligence for purposes of the statute of limitations because this "investigation" without more is insufficient.

b. It was legally impossible for Mrs. Lee to have known of Dr. Williams negligence/fault if there were questions of fact about when she learned of her injury.

As mentioned above, Mrs. Lee claimed that she believed it was Dr. Dewey's negligence in December of 2011 that caused her sensitization until her attorneys received Dr. Williams' records in 2012. R.527-29. Mrs. Lee could not be charged with knowledge of negligence until she knew which of two negligent events, (Williams' negligence in 2008 or Dewey's negligence in 2011), caused her injury. The Utah Supreme Court recognized that when either of two negligent events could have caused an injury, only when the plaintiff knows which negligent event caused the injury is the plaintiff charged with having knowledge of negligence sufficient to trigger the statute of limitations. *Daniels v. Gamma West Brachytherapy, LLC*, 2009 UT 66, ¶ 27, 221 P.3d 256 (a patient cannot know "the negligence which resulted in injury" without knowing what medical treatment or procedure caused his injury). Thus, a plaintiff cannot have knowledge of negligence (termed "fault" in M.U.J.I. 2nd CV 325) until the plaintiff knows of her injury, and knows or should know which of the two negligent acts might have caused the injury.

In this case, there were two separate negligent acts that could have caused the same injury. Furthermore, Mrs. Lee claims that she did not know of the actual injury until her subsequent doctor informed her of her Rh-negative sensitivity in 2012. R.527-

29. Whether she was objectively reasonable in realizing her injury at that time is a question of fact for the jury.

Therefore, the conclusion by the trial court that Mrs. Lee had knowledge of negligence in March of 2009, without ignoring the events surrounding the subsequent negligent act and the objective reasonableness of Mrs. Lee claiming she first became aware of her injury at that subsequent time, was erroneous.

For the foregoing reasons, Mrs. Lee requests a reversal on the grounds that he trial court improperly granted summary judgment on the issue of when she learned of Dr. Williams' negligence/fault.

II. The trial court's jury instruction on the issue of when Mrs. Lee should have "discovered" her injury was erroneous because it failed to comport with all current case law on the matter.

The instruction on the "discovery rule" used by the trial court was "[d]iscovery of an injury from medical malpractice occurs when an ordinary person through reasonable diligence knows or should know that she ***might*** have sustained an injury". R.3007-09, *emphasis added*. The ultimate question on the verdict form was "[d]o you find that Defendants have established, by a preponderance of the evidence, that Kylie Lee knew or should have known, by September 27, 2010, that she ***might*** have suffered an injury". R.2284, *emphasis added*. This standard as articulated in the instruction and as incorporated in the ultimate question is legally deficient for two reasons. First, it impermissibly lowers the degree of knowledge of an actual injury required to trigger the statute of limitations. Second, it wholly fails to include the requirement that a plaintiff

must know or should know of (1) a negligent act and (2) that the negligent act might have caused the actual injury.

a. "Might be injured" is a legally impermissible standard for purposes of the "discovery rule".

For purposes of the discovery rule as it relates to a statute of limitations defense, a patient has discovered her injury only when she has discovered her "legal injury"—that is, both the fact of injury *and* that it resulted from negligence. *Arnold v. White*, 2012 UT 61, ¶ 15, 289 P.3d 449,. (*emphasis original*). The Model Utah Jury Instruction on this very question states as follows:

> [Name of plaintiff] must file a medical malpractice claim within two years from the date [she] discovered the injury or the claim is barred. You must decide the date by which [name of plaintiff] should have discovered the injury.
>
> "Discovery" of an injury from medical malpractice occurs when a patient knows or through reasonable diligence should know each of the following:
>
> (1) that [she] sustained an injury;
>
> (2) the cause of the injury; and
>
> (3) the possibility of a health care provider's fault in causing the injury.
>
> M.U.J.I. 2nd CV 325.

This model jury instruction incorporates the most recent case law on the matter. The very first element to be determined is whether or not a patient has "sustained an injury." It is not until the patient knows or should know of an actual injury that she can even determine whether there was negligence at the hands of the doctor and whether such negligence might have caused that injury. *Seale v. Gowans*, 923 P.2d 1361, 1363 (Utah

1996). Furthermore the injury must be made "manifest" and it is not enough that there exists a possibility or even a probability of harm. *Id.* at 1364.

Under the discovery rule, it is the *knowledge of injury* which triggers the statute, not *notice of probable or possible injury*. *Id. at* 1365, emphasis added. As the rule is incorporated in the Model Utah Jury Instruction, the first element to be determined is simply whether or not the patient knew or should have known "that she sustained an injury." There is no speculative modifier contained in this element, i.e. "might". Such wording in the first element is legally sensible given the case law to which the Model Instruction cites indicates the injury must be "actual" and "manifest"—not speculative or even probable. *Id.* Finally, this is the more appropriate standard because tolling the statute of limitations until the potential harm actually manifests itself allows for more certain proof and fewer speculative lawsuits. *Id.*

In this case, the trial court submitted instructions and questions to the jury that fail to comport with this applicable law. Specifically, in using the phrase "might have sustained an injury"(R.2284), the court invited the jury to improperly consider that Mrs. Lee might have thought her injury was *possible* well before it was actual and manifest. This necessarily results in an improper application of the discovery rule to the facts of the case. In this case, the injury was not manifest until after the birth of her second child in 2011, who was born with substantial medical problems due to Mrs. Lee's then unknown and up to that point un-manifest sensitization. Had they deliberated over the proper question, certainly the jury may not have concluded she knew of her injury in 2010—prior to her second delivery. Therefore, reversal is required given that there can be no

confidence in the jury verdict because the verdict is undermined due to the improper instruction. *Turner v. University of Utah Hospitals & Clinics*, 2013 UT 52, ¶ 17, 310 P.3d 1212.

b. The jury instruction fails because it wholly omits additional required elements.

The jury instruction as presented in M.U.J.I. 2nd CV 325, not only requires a plaintiff know or should know that she "sustained an injury" to trigger limitations, but that the plaintiff also know or should know both the cause of the injury as well as the possibility of the provider's fault in causing the injury. M.U.J.I. 2nd CV 325. In this case, the court wholly failed to include these additional required elements. R.2284. This was obvious error given the fact that proving each and every element under the rule, by preponderance of the evidence, was the Defendants' burden. Therefore the trial court improperly absolved the defense from having to meet their burden of proof as to all three elements and confidence in the verdict is *again* undermined due to the improper instruction.

III. Mrs. Lee did not receive a fair and impartial jury because the trial court refused to strike a juror who had a personal relationship with the defendants and with a defense witness.

Mrs. Lee asserts that she was denied her right to a fair and impartial jury. *West v. Holley*, 2004 UT 35, ¶12, 103 P.3d 708. The standard of review regarding whether a juror should be dismissed for cause is abuse of discretion. *State v. Maestas*,

2012 UT 46, ¶41, 299 P.3d 892. A party is entitled to a new trial by demonstrating that a challenged juror was biased. *Turner v. University of Utah Hospitals & Clinics*, 2013 UT 52, ¶32, 310 P.3d 1212. And while trial courts are afforded "considerable discretion in ruling on motions to dismiss jurors for cause, we have encouraged them to err on the side of dismissing questionable jurors. Dismissing questionable jurors before trial makes practical sense because replacement jurors are readily available." *West*, 2004 UT 35, ¶12 (citing *State v. Saunders*, 1999 UT 59, ¶51, 992 P.2d 951). Furthermore, "A trial court's discretion in ruling on challenges to a juror for cause is limited by the Utah Rules of Civil Procedure and our case law." *Id.* at ¶14.[4]

In *Turner*, the Utah Supreme Court abandoned the "cure-or-waive rule." 2013 UT 52 at ¶25. Instead the Court adopted the following: "[P]arties need not use all of their challenges on jurors who were previously challenged for cause in order to preserve the issue of jury bias for appeal. Rather, as long as (a) all of the party's peremptory challenges were used and (b) a juror who was previously challenged for cause ends up being seated on the jury, the issue of juror bias has been preserved." *Id.* at ¶32.

Here, this issue is preserved because all of Mrs. Lee's peremptory challenges were used and a challenged juror, K.H. (#26), was seated on the jury and participated in the verdict. R.2268, 2288, 3157. Moreover, Mrs. Lee is entitled to a new trial because K.H. should have been excused from the panel because of partiality or bias.

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[4] Rule 47(f)(6), Utah Rules of Civil Procedure, provides that jurors should be removed for cause when "conduct, responses, state of mind or other circumstances… reasonably lead the court to conclude the juror is not likely to act impartially. No person may serve as a juror, if challenged, unless the judge is convinced the juror can and will act impartially and fairly."

Several facts disclosed by K.H. in the questionnaire and during *voir dire* demonstrated partiality and/or bias. One, K.H.'s wife had been a patient of Defendant Dr. Williams. R.2653. Two, he had been a patient at Defendant Moab Family Medicine. R.2652-53. Three, he has been familiar with Dr. Williams and his wife since they opened their clinic (R.2653); which approximately 15 years at the time of trial. R.2857. Fourth, and most important, he worked in scouting with the son of C.W., who as a nurse that treated Mrs. Lee during the delivery of her first child and who testified at trial for the defense. R.2652, 2655. Juror K.H. stated during *voir dire* that "I know her [because] her son was involved in a scouting program we had." R.2652.

While he indicated in *voir dire* that he would not be affected by his experience with nurse C.W. and her family, it was error for the court to simply accept that assurance rather than to strike him for cause or to conduct the further inquiry required by Utah law. The facts surrounding this juror's history with the parties and a defense witness required his exclusion from the jury panel.

In *West v. Holley*, 2004 UT 97, ¶ 14, 103 P.3d 708, the Utah Supreme Court indicated that once statements are made during the jury selection process that facially raise a question of partiality or prejudice, an abuse of discretion occurs unless the challenged juror is removed by the court or unless the court or counsel investigates further and finds the inference rebutted (quoting *State v. Wach*, 2001 UT 35, ¶27, 24 P.3d 948). "Voir dire responses revealing evidence of bias or partiality give rise to a presumption that a potential juror is biased, and the juror must be dismissed unless that presumption is rebutted." *Id.* at ¶14. Additionally, "The Utah Supreme Court has

instructed 'trial judges to take care to adequately and completely probe jurors on all possible issues of bias.'" *Depew v. Sullivan*, 2003 UT App 152, ¶12, 71 P.3d 601 (quoting *State v. James*, 819 P.2 781, 798 (Utah 1991)).

Moreover, "under our case law… a presumption of bias cannot be rebutted solely by a juror's bare assurance of her own impartiality because a challenged juror cannot reasonably be expected to judge her own fitness to serve." *Id.* at ¶15 (citations omitted). Furthermore, the trial court, in refusing to strike for cause, may not rely solely on the juror's own view that he can judge the evidence fairly. Rather, the trial court must identify some other basis for overcoming the presumption of bias. *Id.* at ¶17.

What happened here in regards to K.H. is exactly what the Utah Supreme Court indicated in *West* should not happen. Factual statements were made during the selection process that facially raised a multitude of questions or partiality or prejudice concerning relationships with the defendants and a defense witness. "A juror, who through a personal association with a witness or a party has developed a relationship of affection, respect, or esteem, cannot be deemed disinterested, indifferent, or impartial." *Butterfield v. Sevier Valley Hospital*, 2010 UT App 357, ¶21, 246 P.3d 120 (quoting *State v. Cox*, 826 P.2d 656, 660 (Utah App. 1992) and *State v. Brooks*, 563 P.2d 799, 802 (Utah 1977)); see also *State v. Callihan*, 2002 UT 86, ¶¶47-59, 55 P.3d 573 (trial court properly excused two jurors *sua sponte* where their statements raised inferences of bias that were not properly rebutted by subsequent statements and they had personal relationships with the parties or the witnesses). Such a prospective juror must be

disqualified unless there is an adequate probe by the trial court concerning the potential bias and sufficient evidence is received that the juror will act impartially. *Id.*

However, all the trial court did was to bring K.H. back into the courtroom and ask him: "[W]ould you be affected if [Nurse C.W.] testifies as a witness in this case? Would you be affected by your experience with her son in the scouting program?" R.2656. When K.H. replied "No," the court stated, "Come back at 1:30. I've determined that I accept his answers and I'm convinced he would be impartial." R.2656-57.

That was it. There was no further investigation by the trial court and there was no inferential rebuttal. There was only a reliance on the juror's own view of impartiality based upon one question from the court. Put simply, there was no identification by the trial court or by the defense to overcome the presumption of partiality and/or bias that facially existed due to the relationship between K.H. and the defendants and a defense witness. The lack of follow-up or follow-through by the trial court is particularly disturbing considering the recognition by the court that "[i]n this case jurors are going to be required to determine what they believe the truth to be about something that both Dr. Williams and Kylie Lee will testify about and their testimony will be contradictory." R.2650.[5]

Mrs. Lee asserts that this is yet another example of what the Utah Supreme Court has characterized as a "stark little exercise" which is "the all too prevalent practice of

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[5] Counsel for the defense argued against striking K.H. because "the scouting experience was with [C.W.] and not with the Williams." R.2656. As will be detailed further in the next argument, C.W. was involved in Lee's care during the delivery of her first child and her testimony was critical to that credibility assessment.

avoiding any real inquiry into possible bias by a trial judge's asking a prospective juror if he or she could decide the case fairly and follow the law… and then taking a prospective juror's affirmative answer as dispositive of the issue." *Depew*, 2003 UT App at ¶26 (citing and quoting *State v. Saunders*, 1999 UT 59, ¶34, 992 P.2d 951, and *State v. Worthen*, 765 P.2d 839, 845 (Utah 1988)). Additionally, here the trial court failed even to seek any information whatsoever concerning C.W.'s anticipated testimony. The trial court did nothing but accept K.H.'s affirmative answer to his "stark little" question of "can you not be affected by your relationships to the defendant(s) and defense witness and be fair." There was no probing of the juror or defense counsel concerning the relationships (particularly concerning the witness) nor was there any other basis established by the trial court that could overcome the presumption of partiality/bias of K.H. as required by Utah law.

It is the "trial court's responsibility to seat an impartial jury." *State v. Callihan*, 2002 UT 86, ¶57, 55 P.3d 573. Yet, that did not happen here. The voir dire responses by K.H. revealed evidence of bias or partiality. He should have been dismissed unless that presumption of disqualification was rebutted. It was not—in fact, no effort was made by the trial counsel to do so. Accordingly, "an abuse of discretion occurred" because K.H. was not removed. *West*, 2004 UT 35 at ¶14.[6] Accordingly, Mrs. Lee asks that this Court

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[6]Similar problems also existed with juror, M.H. However, he ended up as the alternate juror and was sent home prior to deliberation. R.2987, 3036. M.H. was a patient of another doctor at the clinic and he was friends with an additional clinic doctor. R.2676, 77. He was challenged for cause. R.2679. When asked if he would feel uncomfortable in the future around his doctor, he replied, "I don't know. I mean, would they know I'm on the jury? I don't-I don't know…. I hope he's a professional and he'll be treating me as

conclude that she is entitled to a new trial because she was denied her right to an impartial jury.

IV. The trial court erred by not allowing Plaintiff to introduce evidence that called into question Dr. Williams' truthfulness about whether he actually informed Mrs. Lee of her injury on December 31, 2008 thus beginning the Limitations period.

Prior to trial, Plaintiff opposed Defendants' Motion *in limine* seeking to exclude evidence that tended to disprove Dr. Williams' assertion that he informed Mrs. Lee of her injury on December 31, 2008, thus beginning the limitations period. R.1863-71. The first such evidence was a "Discharge Summary" apparently generated the day after (January 1, 2009) Dr. Williams allegedly informed Mrs. Lee of her injury, in which Dr. Williams states in part:

> I reviewed my standard postpartum teaching. She is Rh negative with positive antibody screen. We discussed the potential for future miscarriages due to her positive antibody screen. She did receive a RhoGAM. As noted her fetal blood screen was negative. *She did miss her 26-week RhoGAM, which is quite unfortunate and despite having been ordered.*

R.736, *emphasis added*. The court however, only allowed the parties to introduce this record with the emphasized portion redacted. R.2539-40.

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anybody else..." R.2678-79. He was challenged for cause. R.2679. The trial court denied the motion, stating, "I'm convinced he would be impartial based on his answers. I just note that if we're going to excuse people who are patients of that practice, I think we'll go all the way through [#]40 without finding anyone except possibly [#]38. So I'm going to qualify him and that gets us our 17. So you can tell them that [#]35 and up are excused...." R.2680.

The second piece of evidence Plaintiff was prevented to introduce was. Dr. Williams' own admission that nowhere in any of his treatment records was such an order for RhoGAM. R.464-65, 468-70, 476-78. Thus, Dr. Williams' admissions directly contradicted the redacted statement. This contradiction calls into dispute not only whether Dr. Williams ever ordered the prenatal RhoGAM shot as he indicated in the full text of the "Discharge Summary", but more importantly to the statute of limitations question, whether Dr. Williams' was being truthful when he claims to have informed Mrs. Lee of her injury on December 31, 2009. R.2879. Plaintiff believes had this evidence been introduced, the jury could rightfully have inferred: (1) Dr. Williams was attempting to conceal his negligence/fault when he created the January 1 record; and (2) that he did not inform Mrs. Lee of her injury.

The only other testimony Defendants offered to suggest Mrs. Lee knew, or should of known of her injury, was Dr. Williams statement that he thinks he had other conversations with Mrs. Lee about her sensitization (though he could not recall the specifics of those conversations). R.2886-86. Plaintiff elicited testimony that suggested Dr. Williams never had further conversations with Mrs. Lee because (1) Dr. Williams' records were absent any mention of Mrs. Lee's injury/sensitization after 01/01/09 R.2920; and (2) the test result showing Mrs. Lee's Rh-sensitization/injury was not available to Dr. Williams until 01/05/09 (R.2920)—four days after Dr. Williams allegedly told Mrs. Lee about her injury/sensitization. Thus, admission of an underacted portion of the January 1, 2009 record was critical.

In reviewing questions of admissibility of evidence at trial, Utah courts employ

two standards of review. *State v. Horton*, 848 P.2d 708, 713 (Utah App.), cert. denied, 857 P.2d 948 (Utah 1993). With respect to the trial court's selection, interpretation, and application of a particular rule of evidence, case law requires the application of a correction of error standard. *Id.* (citing *State v. Thurman*, 846 P.2d 1256, 1268-72 (Utah 1993)). When the rule of evidence requires the trial court to balance specified factors to determine admissibility, "abuse of discretion or reasonability is the appropriate standard." *Id.* (citing *Thurman*, 846 P.2d at 1270 n.11). Further, even where error is found, reversal is appropriate only in those cases where, after review of all of the evidence presented at trial, it appears that "'absent the error, there is a reasonable likelihood that a different result would have been reached.'" *Belden v. Dalbo, Inc.*, 752 P.2d 1317, 1319 (Utah App. 1988) (quoting *State v. Speer*, 750 P.2d 186, 189 (Utah 1988)); see also *Joseph v. W.H. Groves Latter Day Saints Hosp.*, 7 Utah 2d 39, 44, 318 P.2d 330, 333 (1957); *Utah Dep't of Transp. v. 6200 S. Assocs.*, 872 P.2d 462, 465 (Utah Ct. App. 1994).

With respect to this case and Plaintiff's attempt to introduce the above-mentioned evidence, the court disallowed admission on the basis that it was not relevant to the statute of limitations issue in the now bifurcated trial. R.2475-95. However, this evidence *was* very much relevant to whether or when Dr. Williams in fact told Mrs. Lee of her injury on December 31, 2008 as he alleged at trial. It was and continues to be Mrs. Lee's theory that upon his realization that he did not, in fact, order the prenatal RhoGAM shot, and that he suspected Mrs. Lee had become Rh-sensitized during the pregnancy, that Dr. Williams created the self-serving account in the "Discharge Summary" of a conversation that never actually took place. Because the trial court did not allow Plaintiff

to impeach the veracity of Dr. Williams' assertion that he told Mrs. Lee of her injury on December 31 by pointing out the discrepancies between the redacted document and Dr. Williams's own admission, the jury was left with the misimpression that the "Discharge Summary" simply corroborated Dr. Williams' testimony of having such conversation with Mrs. Lee.

Furthermore, Dr. Williams would have had a motive to conceal the truth about him being the cause of Mrs. Lee's sensitization. Said another way, the apparent misstatement in the Discharge Summary that the 26-week RhoGAM was ordered during the pregnancy evidenced Dr. Williams' motive to conceal his mistake in failing to order RhoGAM. Citing to Ut.R. Evid. 608(c), which states "Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by other evidence", Mrs. Lee further attempted to have this evidence admitted on the basis of showing such motive. The court however continued to deny introduction of the evidence as requested. R.1939-40, 2556-57.

Because the evidence at issue was indeed relevant to both (1) whether and/or when Mrs. Lee became aware of her injury, and (2) whether Dr. Williams may have had motive to misrepresent that he told her of her injury on December 31, 2008, the court erred in not allowing the admission. Had such evidence been introduced and had Plaintiff been allowed to examine Dr. Williams on these issues, a different result is likely in this case. Without full context for the "Discharge Summary" as could have been established through use of other medical records and Dr. Williams admission that no order for RhoGAM appeared in his records, the jury was left believing that the "Discharge

Summary" was simply a written confirmation of Dr. Williams' alleged December 31, 2009, conversation wherein he claims to have told Mrs. Lee about her injury.

V. The trail court erred in failing to consider a remedy for admitted *ex parte* communication between defense counsel and one of Mrs. Lee's non-party treating "physicians" because such communications are wholly improper under current case law and such impropriety demands a remedy.

Mrs. Lee asserts that defense counsel breached her duty relative to a third party nurse's healthcare fiduciary duty of confidentiality to Mrs. Lee by engaging in an *ex parte* meeting with the nurse. That conversation breached Mrs. Lee's right to privacy, prejudiced her at trial, and requires an appropriate sanction. Mrs. Lee, therefore, asks this Court to grant her a new trial and to remand this matter to the trial court with instruction to consider an appropriate remedy.

Regarding the standard of review, "[t]he permissibility of defense counsel's *ex parte* meetings with a plaintiff's treating physicians requires interpretation of previous decisions. And the interpretation of precedent is a question of law that is reviewed for correctness." *Wilson v. IHC Hosp., Inc.*, 2012 UT 43, ¶24, 289 P.3d 369, 379 (other citations omitted).

A physician is bound by both a duty to preserve the physician-patient testimonial privilege and a healthcare fiduciary duty of confidentiality. *Wilson,* 2012 UT 43 at ¶84. The physician-patient testimonial privilege is restricted to court proceedings, while the duty of confidentiality "serves a broader purpose." *Id.* Rule 506 of the Utah Rules of Evidence establishes the physician-patient privilege. *Id.* It grants patients a privilege for

communications with their physician that relate to "diagnoses made, treatment provided, or advice given by the physician." *Id.* But the patient-physician privilege is not absolute. No privilege exists when the "communications are relevant to an issue of the physical, mental , or emotional condition of the patient...in any proceeding in which that condition is an element of any claim or defense." *Id.*

In contrast, a physician's duty of confidentiality encompasses the broad principle that prohibits a physician from disclosing information received through the physician-patient relationship. The duty requires a physician to notify the patient prior to disclosing confidential records or communications in a subsequent litigation." *Id.* at ¶85, see also *Debry v. Goates*, 2000 UT App 58, 999 P.2d 582 (Utah App. 2000). The physician's duty applies even if the communications allegedly qualify for rule 506(d)(1)'s exceptions to the patient-physician privilege. *Wilson,* 2012 UT 43 at ¶85.

Opposing counsel has a duty in the underlying lawsuit to neither instigate nor facilitate a treating physician's breach of the duty of confidentiality to his patient through an improper *ex parte* meeting. *Id.* at ¶ 91. After determining whether defendant acted improperly to some degree, it is next appropriate to consider the appropriate sanction. *Id.* at ¶ 94. The appropriate sanction should be determined on remand by the trial court. *Id.*

Finally, the physician-patient privilege "includes those who are participating in the diagnosis and treatment under the direction of the physician...." Utah. R. Evid. 506 advisory committee's note (3).

There are two policy rationalizes for requiring that a plaintiff's physician provide notice to the plaintiff before meeting *ex parte* with defense counsel. *Id.* at ¶87 citing

Sorensen v. Barbuto, 2008 UT 8, ¶ 12, 177 P.3d 614. First, preventing ex-parte communications without prior notice would protect the patient-physician relationship by providing the patient with "assurance that their candid responses to questions important to determining their appropriate medical treatment would remain confidential." *Id.* Second, permitting *ex parte* communications between a treating physician and opposing counsel would make it impossible for a patient or a court to appropriately monitor the scope of the physician's disclosures. *Id.* Monitoring the scope of the communications between a treating physician and opposing counsel is important because an unauthorized *ex parte* interview could disintegrate into a discussion of the impact of a jury's award upon a physician's professional reputation, the rising cost of malpractice insurance premiums, the notion that the treating physician might be the next person to be sued, and other topics which might influence the treating physician's views.
Id.

The duty of counsel not to communicate with plaintiff's physicians exists because opposing counsel has interests adverse to the patient. *Id.* at ¶ 91.

In this case, Nurse C.W., who treated Plaintiff's pregnancy at issue, was a "physician" employed by non-party hospital Moab Regional Hospital. Because plaintiff neither gave permission nor was afforded the opportunity to be present at any meeting between nurse C.W. and defense counsel, any discussions with defense counsel and nurse C.W. were prohibited *ex parte* communications. Nevertheless, defense counsel and Nurse C.W. had *ex parte* communications prior to the trial.

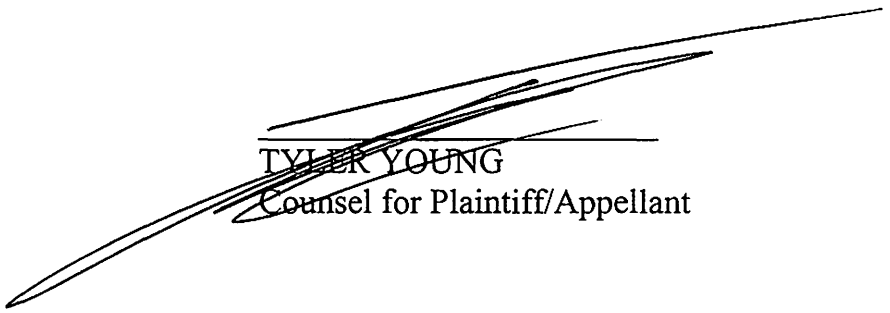
The *ex parte* communications between Nurse C.W. and defense counsel is the exact type of communication prohibited by *Debry, Sorensen* and *Wilson.* Defense counsel communicated about Nurse C.W.'s testimony at the trial and Plaintiff was not afforded the opportunity to monitor whether those discussions disintegrated into a discussion of the impact of a jury's findings upon the physician's reputation, the rising cost of malpractice insurance, the notion that the physician might be the next person to be sued, and other topics which might have influenced the physician's views. It is simply irrelevant that both Nurse C.W. and defense counsel deny any "improper" communications during their admitted *ex parte* communication. Indeed, such denials must be expected.

Plaintiff avers that there was great prejudice in allowing Nurse C.W. to testify after her *ex parte* meeting with Dr. Williams' counsel. This prejudice is especially great given Nurse C.W. acknowledged her 'friendship" with Dr. Williams and association with a juror. Because it is clear that Nurse C.W.'s meeting with Defendants' counsel was impermissible, the trial court should have held a hearing evaluating the totality of the *ex parte* communications and considered an appropriate remedy. In accordance with the required remedy under the applicable case law, Plaintiff requests discovery and a hearing on remand to determine an appropriate sanction for defendant's *ex parte* communication with Nurse C.W.

CONCLUSION

Lee respectfully requests that this Court reverse the trial court's decision and remand the case for a new trial based on the erroneous Order on Defense's Motion for Summary Judgment, the biased jurors, the inaccurate jury instructions that misled the jury, and the exclusion of Lee's relevant medical records. Lee also requests that the Court hold that the healthcare fiduciary duty of confidentiality applies to nurses and other medical providers in addition to doctors, that it find defense counsel breached her duty relative to the nurse's duty, and that it direct the trial court to consider an appropriate sanction.

SUBMITTED this 27th day of October, 2016.



TYLER YOUNG
Counsel for Plaintiff/Appellant

MAILING CERTIFICATE

I hereby certify that on October 27, 2016, I caused to be sent U.S. First Class Mail, true and correct copies of the foregoing *Brief of Plaintiff-Appellate,* to the following:

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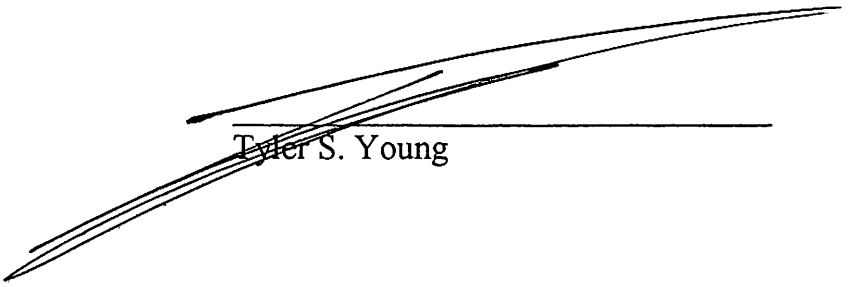

Tyler S. Young

Certificate of Compliance With Rule 24(f)(1)

1) This brief complies with the type-volume limitation of Utah App. P.24(f)(1) because this brief contains 11,809 words, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B).

2) This brief complies with the typeface requirements of Utah R. App. P.27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 13 pt. Times New Roman style.

Tyler S. Young

Dated: October 27, 2016

ADDENDUM

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In The Seventh Judicial District Court Of Grand County
State of Utah

KYLIE ANN BEDDOES LEE, Plaintiff, vs. KENNETH L WILLIAMS and MOAB FAMILY MEDICINE PC, Defendants.	**VERDICT** Case No. 130700019

Instructions:
As soon as six or more of you agree on the answer to the question, the foreperson should answer the question, sign and date the verdict form, and tell the bailiff you have finished. The bailiff will escort you back to this courtroom; you should bring the completed verdict form with you.

Question:
Do you find that Defendants have established, by a preponderance of the evidence, that Kylie Lee knew or should have known, by September 27, 2010, that she might have suffered an injury?

Yes X
No _____

DATED this 28th day of January, 2016

Signed, Foreperson

Timothy M. Keogh
Printed Name of Foreperson

THE SEVENTH DISTRICT JUDICIAL COURT IN AND FOR GRAND COUNTY

STATE OF UTAH

KYLE ANN BEDDOES LEE, an individual **Plaintiff,** **vs** **KENNETH L. WILLIAMS, M.D., an individual, and MOAB FAMILY MEDICINE, P.C., a Utah Professional Corporation, and JOHN DOES I-X** **Defendants,**	**RULING ON MOTION FOR SUMMARY JUDGMENT** **Case No. 130700019** **Judge Lyle R. Anderson**

The Motion for Summary Judgment filed by defendants Kenneth L. Williams, M.D., ("Williams"), and Moab Family Medicine, P.C. is denied.

The claim of Plaintiff Kylie Ann Beddoes Lee ("Lee") that the statute of limitations was extended because Williams fraudulently concealed her injury is without merit. Section 78B-3-404(2)(b), Utah Code extends the statute only when a doctor affirmatively acts to conceal his misconduct. Stretching Lee's allegations to the breaking point, the most that can be said is that Williams did not, on December 31st, 2008, cancel the

order given on December 30th, 2008, for a RhoGAM shot. That is not an affirmative act.

The giving of the RhoGAM shot on December 31st, 2008 is not totally meaningless, however. It figures in the Court's analysis of whether Lee knew, by March, 2009, that she might have been injured.

The running of a statute of limitations for medical malpractice is triggered when a patient knows a provider might have been negligent and the negligence might have caused an injury. Resolving all disputed facts in Lee's favor, it is clear she knew, by March, 2009: 1) that she should have been given a RhoGAM shot during her first pregnancy, and 2) knew she had not been given that shot. Thus, she clearly knew that Williams might have been negligent.

With respect to whether Lee knew she might have been injured by the alleged negligence, the following facts alleged by Lee must be taken as true:

1. Lee knew that her blood could have developed antibodies because she had not been given the RhoGAM shot during her first pregnancy.
2. Lee knew that her blood had been screened after birth.

3. Lee knew that she had been given a RhoGAM shot after her first child was born.

Had Lee not been given the RhoGAM shot immediately following her first delivery, the Court would be forced to conclude that Lee knew, by March, 2009, that she might have suffered the injury of developing Rh antibodies. However, when one adds the additional fact that Lee knew she had been given the RhoGAM shot, and draws all inferences favorable to Lee from that fact, it is possible to conclude that Lee neither knew nor should have known that she might have developed the antibodies. After doing her research in March, 2009, she could reasonably have concluded:

1. I could have developed the antibodies.
2. If I had developed the antibodies, I would not have been given the RhoGAM shot.
3. I was given the RhoGAM shot.
4. Therefore, I did not develop the antibodies.

Williams vigorously contests all of Lee's factual contentions. He maintains that he did instruct Lee to get a RhoGAM shot during pregnancy, that he did not have an opportunity to cancel the RhoGAM shot after becoming aware that Lee had developed Rh antibodies, that he did discuss with Lee

that she had developed Rh antibodies, and that he discussed the risk those antibodies presented to future fetuses. The law requires the Court to ignore evidence favorable to him at this juncture.

Since there are so many hotly contested factual issues connected with the statute of limitations defense, which are largely distinct from the other issues, the Court suggests that the parties consider whether judicial economy would be served by bifurcating this issue. The Court has not determined that bifurcation is warranted, but believes it should be considered.

Counsel for Lee should submit a formal order pursuant to Rule 7, U.R.C.P..

Dated this 21st day of April, 2015.

Judge Lyle R. Anderson

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 130700019 by the method and on the date specified.

MANUAL EMAIL: SUZETTE GOUCHER sgoucher@strongandhanni.com
MANUAL EMAIL: CATHERINE M LARSON clarson@strongandhanni.com
MANUAL EMAIL: TYLER S YOUNG tyoung@utahinjury.com

Date: 04/21/2015

/s/ MICHAEL MACNEIL

Deputy Court Clerk

SEVENTH DISTRICT COURT - MOAB

GRAND COUNTY, STATE OF UTAH

KYLIE ANN BEDDOES LEE,	:	Case No. 130700019
Plaintiff,	:	Appellate Court Case 20160198
v	:	
KENNETH L. WILLIAMS, and MOAB FAMILY MEDICINE, PD.	:	
Defendants.	:	With Keyword Index

PRETRIAL CONFERENCE JANUARY 19, 2016

BEFORE

THE HONORABLE LYLE R. ANDERSON

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 East Ellen Way
Sandy, Utah 84092
801-523-1186

2009. And at the end of that research, she knew that, under her circumstances, she should have received a RhoGAM shot during her pregnancy and at the end of her pregnancy, and she knew that she hadn't received a RhoGAM shot during her pregnancy.

Therefore, either she knew that she had failed to follow the doctor's instructions, or she knew that the doctor had failed to give her the instructions. And I don't presume to know the answer to that question, but it's either one or the other.

And if it's the one, she's out. If it's the other, then she knows that the doctor negligently failed to instruct her to get the shot. That's knowledge of negligence, and I just don't - whether my order that I signed after I granted and denied the motion for summary judgment says that, clearly, I believed that we were narrowing the issues. That I was resolving that question as a matter of law.

And if I didn't do it now, I think I have to - or if I didn't do it then, I think I have to do it now, because the state of the evidence is no different. She's admitted that. Her testimony is the same, whether considered now or considered then.

So it was certainly my intent that we were narrowed down to the question of not whether she knew of the negligence, but the question of whether she knew that she'd

been injured by the negligence, and I think I laid it out in my ruling pretty clearly.

So I disagree with the argument that one cannot - that one cannot know of negligence until one first knows of injury. I think there are circumstances, and this case is an example that you may know of negligence first and later find out about injury. It's rare, but not impossible, and I don't think - because the language and opinions that really has to do with the fact that these two things have to coincide before you have the legal claim really is helpful in understanding the legal principles, and I don't think that any of it establishes the legal principle that one cannot, as a matter of law, know of negligence until one first knows of injury.

So I think the issue we're going to be trying at trial, and it's certainly my intention to contain it to that is did she know or should she have known that she was injured by September of 2010? Now, that doesn't necessarily answer all of the rest of these questions, but that's to be clear. That's what I want the trial to focus on. That is the core of what we're trying.

If you want evidence to be admissible at trial, it has to bear on those issues, and it has to be more useful than it is un-useful. So that's my plan for the trial.

Have I been unclear?

a question by complying with the procedure outlined in this instruction.

14. How convinced should the jury be before making a decision? In a civil trial the party making a claim is responsible to prove it. This responsibility is sometime call a burden or a burden of proof. The party making a claim is responsible to prove that claim by a preponderance of the evidence. This means that after considering and comparing all the evidence presented in court, the convincing weight thereof must be in favor of the party making the claim. If the evidence is evenly balanced or if the balance is not in favor of the claimant, then the claimant has not met its burden as to that claim.

The evidence will not be presented.

Mr. Larson?

MS. LARSON: Yes, Your Honor, we would like to call Connie Wilson and my associate is going to go outside and grab her. While she's doing that I'll turn this around.

CONNIE K. WILSON

having been first duly sworn, testified upon her oath as follows:

MS. LARSON: Thank you, Ms. Wilson.

DIRECT EXAMINATION

BY MR. LARSON:

Q Would you please state your full name?

A Connie K. Wilson.

Q All right. And what is your profession?

A I'm a registered nurse.

Q And how long have you been a registered nurse?

A This summer it will be 20 years.

Q All right. And where are you employed?

A At Moab Regional Hospital.

Q And how long have you been employed there?

A Well, at Moab Regional Hospital since they opened in 2011 and then Allen Memorial Hospital since 1996.

Q All right. And in 2008, December of 2008 what department were you working at Allen Memorial Hospital?

A As a nurse in labor and delivery.

Q And had you had occasion to work with Dr. Williams in that capacity?

A Yes.

Q How frequently over the - how many years have you been working with Dr. Williams?

A When he got here in Moab, I believe that was 2000, I'm trying to remember based on when my son was born, so I think it would be 2000.

Q Okay, close enough.

A Yeah.

Q So over the last 15 years then how many occasions, if you can give us a rough estimate, have you had opportunity

to work with Dr. Williams?

A Well, I am one of - at that time I would have been one of two and a quarter nurses that took calls. So I would say, a hundred babies a year, and he probably delivered 30 of them. So I might have been with him 30 times, you know, or maybe a half of 30, maybe 15 times.

Q A year?

A With him on actual labor and delivery patient. But we would see patients coming in and out of the hospital too, for other reasons.

Q And how you had occasion to observe Dr. Williams explaining medical conditions to patients?

A Yes.

MR. YOUNG: Objection. May we approach?

THE COURT: Yes.

(Whereupon a sidebar was held as follows:

MR. YOUNG: Judge, if she's going to talk about character evidence, this is character evidence, is that where we're going?

MS. LARSON: No, it's just to state his habit and his custom. The whole issue of this case is the issue of communication and so this witness and my next witness are only going to say I've had occasion to observe him communicate and this is what I've observed.

MR. YOUNG: Character -

MS. LARSON: So it does not go to character or reputation at all.

MR. YOUNG: It sound like -

MS. LARSON: This is what the whole case is about.

MR. YOUNG: Judge, I also - I have some questioning I think I need to do of this witness outside the presence of the jury. I would like to know why Mrs. Larson is so very well rehearsed with my client's treating medical provider who does not work at the defendant's office. I want to know if Mrs. Larson was communicating with this witness outside of my authority and my client's presence. This is my client's treating medical provider. We didn't sign a release to allow her to speak with her. I need to know if they met outside my presence and my client's presence.

Judge, there's a decision called Barbuto that's out there and it's currently in litigation right now in Provo, actually the Wilson v. IHC case where a guy by the name of Dr. Boyer changed some of his opinions that negatively affected one of his patients. He is currently, the Supreme Court has sent down sanctions against Dr. Barbuto and they're having a trial on it literally as we speak in Judge Johnson's Court in the Fourth District Court on this very thing. If they met outside of my presence or there was any communication outside of my client's presence, I move to strike the witness, Judge.

MS. LARSON: Your Honor, I'm going to ask her about her involvement with Mrs. Lee's delivery. She was deposed. She doesn't have any memory and nothing relevant to speak of. The only reason I'm calling this witness and the next witness who was also a nurse whose been deposed, is only to ask this one or two questions of observations of Dr. Williams in communicating with patients because that's the issue is plaintiffs are claiming that he did not communicate with them.

MR. YOUNG: I would respond by just saying too that defendants moved to exclude character evidence and the Court ruled I couldn't put on character evidence and this is character evidence about what he typically does, Judge -

MS. LARSON: No -

MR. YOUNG: - that's why I would have a hard time with this evidence in that respect too.

MS. LARSON: - I don't see 608 (inaudible). I see this, I think it's four -

THE COURT: Let's excuse the jury and we'll (inaudible).

MS. LARSON: Thank you.

MR. YOUNG: Thank you.

(End of sidebar)

THE COURT: Okay, members of the jury, I need to talk to the lawyers about this for a bit. So, I'm going to

excuse you. I think it won't take more than 15 minutes. There are treats in the jury room, so maybe that's the place you want to go.

(Whereupon the jury left the courtroom)

THE COURT: You can be seated. The record will reflect that the court is in session outside the hearing of the jury.

If you're comfortable there you can just stay right there 'cause we may have some questions of you. Okay?

I'm hearing - and I should note I don't think I have the ability to make a record up here and not have it broadcast throughout the courtroom. So there will be two ways of dealing with these conferences. We can have them and then make a record as we may need afterwards or we can excuse the jury and do in open court to make a record.

CLERK: (Inaudible).

THE COURT: So when I push this button (inaudible)?

CLERK: Push that one.

THE COURT: okay, so how do I avoid broadcasting to the courtroom what we're talking about? Okay. So now we can record. So I ask you to do it and you can do it?

CLERK: I do it (inaudible).

THE COURT: Okay, great. I don't have the ability but my clerk does and that's where the authority should rest. Okay.

MR. YOUNG: Judge, might I ask the witness a few questions since she was my client's treating medical provider?

THE COURT: Yes.

MR. YOUNG: Thank you.

VOIR DIRE EXAMINATION

BY MR. YOUNG:

Q Good afternoon, Ms. Wilson.

THE COURT: Actually, we're not to that yet. You don't' want to call her yet, do you?

MR. YOUNG: Not cross examination.

THE COURT: Okay, so first, the first hurdle that Ms. Larson has to get over is, is this habit evidence or is it character evidence. So you're premature.

MR. YOUNG: Oh, this is about just what conversations she had with Mrs. Larson so I can know about that.

THE COURT: I don't care about that yet.

MR. YOUNG: Okay. I just wanted to make a record on that and then make my objection based on what her answers are to those questions.

THE COURT: Fine, you can make it later.

MR. YOUNG: After - do you want the jury around when I do that or...

THE COURT: No, not yet.

MR. YOUNG: Oh, you're saying let's talk about the character - sorry.

THE COURT: Yeah, if she's not going to testify, why do you care?

MR. YOUNG: Good point.

THE COURT: Okay. So if she's just going to testify about character then it isn't coming in. If she's going to testify about habit, she can and the boundary between character and habit is, is there but not always clearly defined. So...

MS. LARSON: So Your Honor, the rule with respect to character is 608 as you know, witness's character for truthfulness or untruthfulness. This witness is not intended to go there.

THE COURT: Or also a person's tendency to do anything.

MS. LARSON: Well, under 406, evidence of a person's habit, routine, or practice may be admitted to prove that on a particular occasion the person acted in accordance with the habit or routine practice. So my -

THE COURT: Okay, that -

MS. LARSON: - intent with this witness -

THE COURT: Right. You want to show habit.

MS. LARSON: I want to show habit.

THE COURT: Okay, but you have to get past, you

have to get past character to get to habit. I mean, at some point something we do goes beyond character and becomes habit.

MS. LARSON: Well, but I'm not using this witness to establish character for truthfulness or untruthfulness and that's the 608.

THE COURT: But that's not the only character trait and that's not the only rule on character. Okay. So there's character for truthfulness, there's character for violence, there's character for, you know, any character trait you can think of can be a character trait. And we don't allow people to testify about most character traits to prove that a person acted in conformity therewith. It has to go beyond becoming a character trait to becoming a habit. Now, many of those are different in nature but they're very similar to one another and that's, that's the point. I have to have a foundation for this being not something that is a character trait but something that is a habit or a routine.

MS. LARSON: And my purpose of that is with the questions asking this witness her, the frequency with which she's had occasion to observe Dr. Williams.

THE COURT: Okay. So what is it - why don't you run through it then, what you intend to show.

MS. LARSON: So do you want to ask her?

THE COURT: Yes, go ahead and ask her.

Q (BY MS. LARSON) So over the 15 years that you've worked at Allen Memorial Hospital, you've testified that you've had 15 to 30 occasions a year to work with Dr. Williams.

A That would just be a guess. I really, truly don't know how many times I would call him on a phone about a patient who didn't have her baby. So I want to make sure that you understand, I don't have a number, but I -

Q No, you don't have a number.

A - if you do the math based on how often I'm on call and how often he was probably on call, if it's about a patient in labor, probably somewhere between 15 and 30 times a year.

Q It would be many?

A I'm sorry?

Q Would it be many?

A I would agree that would be many times a year, yes.

Q And would you, would it also be many times over the course of 15 years that you've had occasion to be with Dr. Williams when he has been explaining medical conditions to a patient?

A Yes, many.

Q Many times?

MR. YOUNG: Objection, hearsay.

THE COURT: Overruled.

Q (BY MS. LARSON) And on those many occasions what has been your observation with respect to how Dr. Williams communicates medical conditions to patients, generally?

MR. YOUNG: Objection, and if this is the line of questioning, Judge, I just believe that counsel is opening the door to me being able to discuss with the nurse how many times she's observed Dr. Williams after learning of potentially being negligent.

THE COURT: Okay. I guess that warning is given.

MS. LARSON: Well, and I appreciate the warning because I will take that into consideration whether we continue to call this witness.

THE COURT: Okay. Let's take one step at a time.

Q (BY MS. LARSON) And on those occasions where you've had opportunities to be with Dr. Williams when he's been explaining medical conditions to his patients, what have been your observations?

MR. YOUNG: Same objection, Judge.

THE COURT: Same objection is hearsay?

MR. YOUNG: Objection that it's just opening the door.

THE COURT: You can't object that someone is opening a door. It has to violate a rule of evidence.

MR. YOUNG: Thank you.

THE COURT: Same warning?

MR. YOUNG: Yes.

THE COURT: Don't give the warning any more. You did it once, don't need to do it -

MR. YOUNG: I was going to say I'll just make it a continuing warning.

Q (BY MS. LARSON) What has been your observations?

A Dr. Williams, in my opinion is very straightforward, he educates in detail and spends a lot of time in the room when there's choices or new things that happen in labor and delivery that he needs to explain to a patient about what might happen to them. But always very detailed and very straightforward and those would be the only adjectives I could use.

Q If patients have had questions, what has been your observations as to how Dr. Williams responds?

A He would answer their questions -

MR. YOUNG: Objection, hearsay.

THE WITNESS: And spend, you know, enough time -

MS. LARSON: Hold on a minute.

THE COURT: Overruled, not offered for the truth but offered as a statement.

MS. LARSON: Go ahead.

THE WITNESS: You know, I've never been a situation where he didn't answer questions that a patient had and answer them in a way that was, you know, detailed, detailed.

Q (BY MS. LARSON) In your observation what - has Dr. Williams used terminology that appears to be understandable to a lay person?

A Yes.

MS. LARSON: Your Honor, that's essentially all I intended for this witness and the next one. If based upon the objections this is going to open a door to negative character evidence then I would like to obviously talk with my client and make a decision as to whether we call the witnesses.

THE COURT: Okay. So then you would ask if she is allowed to ask those questions you would ask on how many of those occasions, how many times have you had a chance to observe what Dr. Williams does as far as educating his patient after he might have done something that was negligent?

MR. YOUNG: Exactly.

THE COURT: And what will you say if he asks that question?

THE WITNESS: I've never been in a situation where he's educated a patient about a negligent experience.

MR. YOUNG: I think you stated it correctly, Judge, so I think the question would be a little different.

THE COURT: Yeah, it's not - it would be and on how many of those occasions have, let's see, so have there been

any occasions where you thought he might have been negligent and you saw how he educated?

THE WITNESS: Zero, I personally have not been in the room where he ever explained to a patient there was a negligent -

THE COURT: That's not the question either. So a doctor screws up -

THE WITNESS: Yes.

THE COURT: - maybe nurses notice it but they don't come in and say, patient, I want to tell you your doctor screwed up, right? I doubt many nurses do that.

THE WITNESS: Well, in my career I have seen a doctor go in and explain what went wrong, not Dr. Williams, but in my career I have seen that, yes, and they explain what's going to happen next, you know, based on there was a medical error.

THE COURT: I think you're still missing the point here.

THE WITNESS: Okay, sorry.

THE COURT: I am not asking you about him going in and saying I screwed up, have you ever had a case where he came and said I screwed up and let me tell you how I screwed up, I'm sorry. I'm asking you, have you had any occasions where you thought in that circumstance the doctor might have made a mistake but the doctor is not saying I made a mistake,

necessarily, the doctor is just coming in and educating the patient? Have you seen that with Dr. Williams?

THE WITNESS: Can I repeat what you're asking -

THE COURT: Have you ever had a case with Dr. Williams where you thought maybe he'd made a mistake and you had the opportunity to observe what he did as far as educating the patient?

THE WITNESS: I've never had a case like that with Dr. Williams.

THE COURT: Okay. I don't know what the point would be of you asking that question except just to throw it out there when this witness would say I've never had that.

MR. YOUNG: If the inference is one of habit, I think we need to have a similar factual scenario for the habit. The factual scenario here is that Dr. Williams would have learned that Kylie didn't get a RhoGAM shot, didn't get it during the pregnancy. So what did he explain to her then on that day when it wasn't given to her during the pregnancy. If there's some establishment of - I could see the relevance of it if it had happened several times and there had been several other scenarios where Dr. Williams (inaudible) but we've got a different factual scenario here where we - facts that are established that Kylie did not get the RhoGAM shot during the pregnancy, that was known, it's not disputed, there's no order for it in Dr. Williams' records and he would

have known generally that she had built an antibody on January 1, 2009 but was then faced with talking to Kylie about that after knowing that there's no order for RhoGAM shot in his records and she didn't get it. And that's the factual scenario I think we have here that's different than just regular -

THE COURT: So you're saying really we need, in order to introduce habit evidence you have to have evidence of a doctor's habit in a specific circumstance like this -

MR. YOUNG: Yes.

THE COURT: - where there is the question about whether the doctor has been negligent or the patient has been negligent and what does a doctor do in that circumstance?

MR. YOUNG: Yes.

THE COURT: So this actually goes to whether I should allow it in as habit evidence because all of the habit evidence she has, this witness has observed is in situations where there's no question of medical negligence, right?

MR. YOUNG: Yes, I think both my objection would be it sounds like character evidence to me but it also goes, if Mrs. Larson is introducing it saying it's a habit then I would say it's not the right factual scenario.

THE COURT: Do you have anything you want to say, Ms. Larson?

MS. LARSON: Not that I haven't already said. I

think, I don't think that habit rule requires such specificity with a factual scenario that it would preclude this more broad stroked type of testimony.

THE COURT: Okay. So Ms. Larson, you're saying that we have established a foundation with this witness that there is enough, enough repetition of this that it can be called a habit?

MS. LARSON: Correct.

THE COURT: And Mr. Young, you're saying no, this is just evidence of Dr. Williams' character for care, meticulousness?

MR. YOUNG: Yes.

THE COURT: It's a character trait of being meticulous?

MR. YOUNG: Yes.

THE COURT: And I don't suppose either of you has a good case that teases out the difference between those two things?

MS. LARSON: I don't.

MR. YOUNG: I didn't know I was going to be making the objection today.

THE COURT: Okay. It's a lot of instances she's had, I think it qualifies as habit, at least there's a foundation for considering it as habit, so I'll allow it.

And then the question would be if I do then you

will want to ask this question that you've articulated, on how many of those occasions was it a circumstance where either the doctor or the patient missed something and as a result the patient has had something to come back to haunt them happen?

MS. LARSON: That's correct.

THE COURT: And you would say I don't know of any such instance?

THE WITNESS: Correct.

MR. YOUNG: I would also like to inquire with the witness there with the door being opened if I can ask that question, lay a little of basis for that in he opinion, you know, to get out there whether or not there was a mistake and what Dr. Williams would have realized by looking at his records.

THE COURT: Okay. That's just one incident. So I'm not going to allow the question even. It just throws that out there without any basis to back it up. You're going to be free to argue, of course, that all the habit evidence in the world where things are going great doesn't matter in a situation where something has gone wrong. You don't know from that how the doctor is going to act when either he or the patient has been, has failed to do something that should have been done. But that's not going to be something you can ask this witness about because she doesn't have any basis for

what happens in that circumstance.

Okay. Are you clear on what I've ruled, Ms. Larson?

MS. LARSON: I am clear. At sidebar counsel made another -

THE COURT: Yes -

MS. LARSON: - statement about Barbuto which has me obviously concerned.

THE COURT: Now you want to say she shouldn't be allowed to testify because she's a medical provider for your patient, for your client.

MR. YOUNG: I just would like to talk with her about that.

THE COURT: Okay.

MR. YOUNG: Can I just ask her some questions outside the presence of the jury to find out what's gone on?

THE COURT: Okay. But you don't plan to ask her about the treatment of Kylie Lee at all?

MS. LARSON: No, not at all. So if I'm taking Mr. Young's argument to, you know, the next step, I could never talk to anyone in the hospital who may have incidentally treated someone - I'm not asking -

THE COURT: Right, I don't see how you buy the loyalty of a medical provider simply by hiring them. You buy their confidentiality and with respect to their treatment of

you, you buy their confidentiality and their - nothing brings to question whether they can't talk to anyone.

MS. LARSON: I think that that's reading Barbuto in a very skewed way because I'm not asking this witness anything about her involvement in the treatment of Kylie Lee. So that argument would suggest that I can't talk to anyone whose had contact with any of Dr. Williams' patients.

THE COURT: Right, and that's patently ridiculous.

MS. LARSON: Well, I agree.

THE COURT: So what do you hope to -

MR. YOUNG: For cross examination and for preservation of the record I would just like to ask those questions of the witness just to find out, because I haven't had an opportunity (inaudible) from my client, I would like to just find out what those communications were and -

THE COURT: Okay, ask.

VOIR DIRE EXAMINATION

Q (BY MR. LARSON) Nurse Wilson, how did you prepare with Ms. Larson or the defense to get ready for your testimony here?

A I was called last night and asked if I would be willing to come in and talk about how Dr. Ken Williams educates patients.

Q Who called you?

A Mrs. Larson, the attorney.

Q And how long did that phone call last?
A A couple minutes.
Q And did she tell you who she represented?
A Yes.
Q Who did she tell you she represented?
A Dr. Ken Williams.
Q And can you recall what she talked with you about?
A Yes. She asked if, you know, my experience with working with Dr. Williams, if I would have been around him when he educated and his style of education. And I said, yes, I've been there for many years and I could answers questions you had and other than she told me where to show up and that I wasn't subpoenaed, it was voluntary and, you know, I honestly didn't know where the courthouse was so we talked more about that than anything else.
Q Small town, you don't know.
A I know, I was like is it in this building. Yeah.
Q Were there conversations about Kylie herself?
A No.
Q Kylie's care?
A No.
Q Nothing like that?
A No.
Q Did she use her name do you know?
A Maybe she said in the case regarding this patient

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but I honestly can't say that for sure. She might have said the name of the case but I don't remember.

Q Was the only time you talked to Mrs. Larson or have you talked to her before?

A I was deposed in the case, was it two years ago?

Q That's fair.

A And so I met her then.

Q But just last night on the phone, hadn't talked to her staff or anyone today?

A Her staff called me today and told me to come earlier. They had told me to come at 3:00 and they asked me to come at 2:00 and actually left me a voice mail. I actually didn't get to speak directly to them. So there's two phone calls.

Q Have you talked with Dr. Williams at all about the case since your deposition or...

A No. I mean not about the case. I talk to him, but I haven't talked to him about the case.

Q Okay. I saw you nodding before you said no, so I was wondering...okay, has the case been mentioned or...

A We haven't talked about Kylie's case. He did mention yesterday morning that he had a case today because I work with him.

Q Okay. Last night in the conversation - first of all, have you exchanged any emails or anything like that with

counsel for the defendant?

A She emailed me my deposition last night so I could review it in case there was going to be questions on my deposition.

Q And what is your email address?

A The one she used last night is Connie.wilson40.

Q Connie.Wilson?

A Forty, 4 - zero@gmail.com.

Q Was there a body of that email?

A Yeah, I think there were something that we were going to be called as witnesses.

Q And has she ever text messaged you at all or any of her staff?

A No.

Q And just to be clear, I guess I asked a compound question whether she had or whether her staff had. Did - are you aware of whether Kylie has signed any release to give you the authority to talk with Mrs. Larson about Kylie?

A No.

Q Have you talked since the deposition or at all, have you talked with Dr. Williams about Kylie's care, the RhoGAM shot that day or anything along those lines?

A No.

MR. YOUNG: Thank you, Judge. That's all I've got.

THE COURT: Okay. Bring the jury back in.

I would do it because it's a civic duty -

THE COURT: But if you had a choice, if we gave you the choice you'd say no thanks?

MR. HARMESON: Mostly at this time 'cause I have a lot going on in my business and stuff like that. But -

THE COURT: Why don't you tell me about that because I have excused some people because it would be so inconvenient for them.

MR. HARMESON: Well, right now I work out at Intrepid Pot Ash and I'm the production superintendent out there. And we have just started actually moving some product and we haven't for a while, so we've got a lot going on, some issues there but, you know, I've got people taking care of it so it's not a thing I really need to be excused for and I would serve if I needed to.

THE COURT: Okay, thank you. I'm Judge Anderson. This is Catherine Larson, she's the attorney for Dr. Williams and Tyler Young, the attorney for Kylie Lee. In this case jurors are going to be required to determine what they believe the truth to be about something that both Dr. Williams and Kylie Lee will testify about and their testimony will be contradictory. So it's going to be important that jurors be able to decide what they believe the truth to be about that without - just based on what they hear in the courtroom, not including anything else and I notice you have

recently been to the Moab Family Medicine?

MR. HARMESON: Yes.

THE COURT: You said recently with his and I see p-h-o?

MR. HARMESON: No, with his PA.

THE COURT: Okay. Would - and is that included or was it just a one-time visit?

MR. HARMESON: It was just a one-time visit, yes.

THE COURT: Would you be concerned about being able to go back there -

MR. HARMESON: No.

THE COURT: - if you ruled against Dr. Williams?

MR. HARMESON: No, I don't think so. It was a good experience there. If we ruled against I'd still need medical care at a point and I was comfortable with that.

THE COURT: And there are other places you can go besides Moab Family Medicine, right?

MR. HARMESON: There are.

THE COURT: Okay. All right. I don't have any other questions. Well, 19, you said I do think there are too many lawsuits of medical malpractice which affect costs of medical insurance. That may be - that sounds like a general concern that you have and there might be quite a few people in the United States that agree with you. However, this is just one case, right?

MR. HARMESON: Yes.

THE COURT: Are you - we do not require that jurors have any particular view about whether there are too many or too few medical malpractice cases but we do require that they decide this case based on this case's evidence and without trying to correct any greater ills in the world.

MR. HARMESON: I think that's fine. I don't have an issue with that.

THE COURT: Okay. Ms. Larson, do you have any additional questions?

MS. LARSON: No, I don't, Your Honor.

THE COURT: Mr. Young, do you have any?

MR. YOUNG: Thank you, sir. You marked that you know, is is Connie Wilson?

MR. HARMESON: Uh-huh (affirmative).

MR. YOUNG: And is she a Moab Family Medicine (inaudible)?

MR. HARMESON: I don't know her from there. I know her from he son was involved in a scouting program we had and so that's how I know her.

MR. YOUNG: Met her as part of your personal life?

MR. HARMESON: Uh-huh (affirmative).

MR. YOUNG: Okay. And do you know Dr. Williams personally at all?

MR. HARMESON: I don't know him personally although

we have visited years ago, my wife went to Dr. Williams for a little bit and I had recently gone into this practice but I have not really personally known him.

MR. YOUNG: I think you said if you do have medical needs in the future you may go back to Moab -

MR. HARMESON: I had a good experience, yes.

MR. YOUNG: And Kathryn Williams, do you know her personally?

MR. HARMESON: No, not personally. I just know who she is, yes.

MR. YOUNG: How long have you lived in Moab?

MR. HARMESON: Most of my life, at least 50 years.

MR. YOUNG: Can you tell me when you became familiar with Kathryn and Ken Williams?

MR. HARMESON: I think when they first opened their practice. My wife and I, I didn't have a procedure but my wife needed to go to the doctor, we went and seen them.

MR. YOUNG: So on and off it sounds like at least since they had come to town?

MR. HARMESON: Yeah, we only seen them initially and then we had a different doctor at the time that we went to and then recently I've had some bad experiences with some medical help with a different doctor. So I actually went to their practice.

MR. YOUNG: Was that in Moab Family Medicine?

MR. HARMESON: No.

MR. YOUNG: And this is a medical malpractice case and the Court asked you about this a little bit. Would you mind sharing your beliefs about why this is so, why you think medical insurances rates, it is rates, might be increased because of lawsuits or costs?

MR. HARMESON: You know, I think, just my viewpoint is that I think there are necessarily lawsuits. I think in fact in my questionnaire that my father had some situations which ultimately affected him. He went like a week with a stroke and they didn't notice it and this was in Denver. I think we had a realistic point for a lawsuit. We chose not to. I think sometimes there are legitimate reasons. I think sometimes there's not.

MR. YOUNG: Thank you.

MR. HARMESON: Uh-huh (affirmative).

THE COURT: Any questions?

MS. LARSON: No.

THE COURT: Okay, we'll let you know in a minute. Just wait outside, we'll let you know.

All right, you want to challenge this one for cause, Mr. Young?

MR. YOUNG: Yes, Judge.

THE COURT: And it's because?

MR. YOUNG: He's known the Williams family since

they moved to town. It sounds like his wife was treated at the clinic. He has had some treatment at the clinic, sounds like he intends to go back even if he says he can be unbiased I think we can determine that he would be unbiased. It's just too close of a relationship and it sounds like they even have a personal relationship between I think he said scouting, just too close -

THE COURT: That's an RN, Connie Wilson. I don't know who she is. Is she someone that works at Moab Family Medicine?

MS. LARSON: She works at the hospital.

THE COURT: Okay.

MR. YOUNG: She did. I think she - oh, she did some treatment things for Kylie.

THE COURT: Is she your witness?

MR. YOUNG: No, she's not going to testify in the trial.

MS. LARSON: She's our witness and she was involved in Ms. Lee's care during the delivery of her first child.

MR. YOUNG: Are you going to call her?

MS. LARSON: Yes.

THE COURT: Ms. Larson?

MS. LARSON: Well, Your Honor, I disagree with Mr. Young. This witness or juror treated once at Moab Family Medicine by the PA, not by Dr. Williams. He does not know

them personally. He said that specifically. The scouting experience was with Connie Wilson and not with the Williams. There is no relationship there that would form a strong and deep seeded bias and he didn't answer any questions that would even suggest that he had a bias. In fact, his own father and himself have had issues where they felt like they had a right to bring a lawsuit. So he recognizes that some are necessary and some may not be necessary and that would suggest that he will be impartial and weigh the evidence and rule based upon the evidence.

THE COURT: Okay. I -

MR. YOUNG: I would state an additional objection, based on his personal relationship with Connie Wilson if she's going to be a witness. I wasn't aware of that. I don't think we took her deposition. I'd be interested to know what she has to say but, Judge, he's got a personal relationship with her and knows Dr. Williams, plans on going back to the clinic. I need to challenge him for cause.

THE COURT: Let's bring him back in and I'll ask him about his relationship with Connie Wilson.

Mr. Harmeson, would you be affected if Connie Wilson testifies as a witness in this case? Would you be affected by your experience with her son in the scouting program?

MR. HARMESON: No.

THE COURT: All right, thank you. Come back at 1:30. I've determined that I accept his answers and I'm convinced that he would be impartial.

MR. YOUNG: Challenge for cause.

THE COURT: Okay. Patience York is next.

Ms. York, come and sit right here please. Do you swear that the statements you made in your questionnaire are the truth?

MS. YORK: Yes.

THE COURT: And do you swear that you'll tell us the truth now?

MS. YORK: Yes.

THE COURT: Okay, I'm Judge Anderson. This is Catherine Larson, she's the attorney for Dr. Williams; and this is Tyler Young, he's the attorney for Kylie Lee. Thank you for being here. We just want to see if there are any followup questions from the lawyers.

Do you have any, Ms. Larson?

MS. LARSON: Yes. Ms. York you marked that you know Kathryn Williams, how do you know Dr. Kathryn Williams?

MS. YORK: She's my doctor.

MS. LARSON: Okay, and how regularly do you see her?

MS. YORK: I've been there every year. So I've only seen her three times.

INSTRUCTION NO. 20

The issue for you to decide is whether Kylie Lee filed her claim more than two years after she should have discovered her legal injury.

You shall consider and weigh all the evidence to determine whether Kylie Lee by the use of reasonable diligence had actual or constructive facts by which she knew or should have known, prior to September 27, 2010, that she might have suffered an injury.

If the greater weight of the evidence supports the defense of Dr. Williams and Moab Family Medicine on this issue, Kylie Lee's claim against them is time barred, and your verdict is for Dr. Williams and Moab Family Medicine. If, however, the greater weight of the evidence does not support the defense of Dr. Williams and Moab Family Medicine on this issue, your verdict should be for Kylie Lee.

INSTRUCTION NO. 29

"Discovery" of an injury from medical malpractice occurs when an ordinary person through reasonable diligence knows or should know that she might have sustained an injury.

ALLEN MEMORIAL HOSPITAL
DISCHARGE SUMMARY

PATIENT NAME: BEDDOES, KYLIE
SEX/AGE: Female, 19 years old **D.O.B.:** 07/09/89
PROVIDER: Kenneth Williams, M.D.

ADMITTED: 12/30/08
DISCHARGED: 01/01/09

PRIMARY ADMISSION DIAGNOSES: A 19-year-old gravida 1, para 0, term intrauterine pregnancy.

DISCHARGE DIAGNOSES:
1. A 19-year-old gravida 1, now para 1, status post spontaneous vaginal delivery.
2. A viable 7-pound (3175 gram) male with Apgars of 9 and 9.
3. Intact placenta with three-vessel cord.
4. Left vaginal sidewall laceration.
5. Postpartum anemia.
6. Leukocytosis without stigmata of infection.
7. Rh negative with negative fetal blood screen and fetus with positive direct Coombs.
8. Negative fetal blood screen with positive antibody screen.

DIAGNOSTIC STUDIES: Discharge white count 18,000, hematocrit 25.5, platelets 397, fetal blood screen was negative. Blood type A-, antibody screen was positive.

SUMMARY OF HOSPITALIZATION: Kylie is a 19-year-old gravida 1, now para 2, two days postpartum status post vaginal delivery complicated by a left vaginal sidewall laceration. She did well postpartum, was breastfeeding with bottle supplement. Her lochia was scant. She was afebrile. She did have an impressive white count but no specific stigmata of infection, and the white count was normalizing without intervention. I reviewed my standard postpartum teaching. She is Rh negative with positive antibody screen. We discussed the potential for future miscarriages due to her positive antibody screen. She did receive a RhoGAM. As noted her fetal blood screen was negative. She did miss her 26-week RhoGAM, which was quite unfortunate and despite having been ordered. She seems to understand the potential implication of future miscarriages.

DISCHARGE MEDICATIONS: Motrin 800 q 6 hours p.r.n., iron sulfate 325 b.i.d., prenatal vitamin 1 q day.
FOLLOW-UP: She will follow up with my wife tomorrow. She will call for an appointment.

Kenneth Williams, M.D.
/ms25DD: 01/01/09 DT: 1028TD: 01/02/09 TT: 1036#388989

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Allen M.H. 000192 Beddoes

DEFENDANT'S EXHIBIT
EXHIBIT NO. 6
CASE NO. 130700019
DATE REC'D IN EVIDENCE 1-28-16
CLERK

DEFENDANT'S EXHIBIT
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6