Charles H. Thronson (3260)
cthronson@parsonsbehle.com
PARSONS BEHLE & LATIMER
One Utah Center
201 South Main Street, Suite 1800
Salt Lake City, UT 84111
Telephone: (801) 532-1234
Facsimile: (801) 536-6111

Michael A. Worel (12741)
mworel@dkolaw.com
DEWSNUP KING & OLSEN
36 South State St., Suite 2400
Salt Lake City, Utah 84111
Telephone: (801) 533-0400
Facsimile: (801) 363-4218

Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

DAVID SCOTT and DEBRA SCOTT, Plaintiffs, vs. UNIVERSITY OF UTAH HOSPITAL AND MEDICAL CENTER, Defendant.	**PLAINTIFFS' RESPONSIVE MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR NEW TRIAL** Case No. 110917738 Judge Su Chon

COME NOW plaintiffs, by and through counsel and pursuant to the Utah Rules of Civil Procedure, and herewith file their Responsive Memorandum in Opposition to Defendant University of Utah Hospital and Medical Center's (hereinafter "defendant hospital") Motion for a New Trial.

TABLE OF CONTENTS

INTRODUCTION 1

THE LAW 2

FACTUAL BACKGROUND 4

PLAINTIFFS' LIABILITY AND CAUSATION WITNESSES 7

DEFENDANTS' EXPERT WITNESSES 18

ALLEGATIONS OF "ATTORNEY MISCONDUCT" 22

I. THE STATEMENTS OF PLAINTIFFS' COUNSEL DO NOT JUSTIFY A NEW TRIAL. 22

- A. Counsel did not make improper "conscience of the community" or "send a message" arguments 22
  - 1. The first statement was not improper 23
  - 2. The second statement was not improper. 26
  - 3. The Hospital waived any objection to the statements. 27
  - 4. The statements did not violate the Court's order in limine. 27
  - 5. Any alleged error was harmless. 30
- B. Counsel did not improperly imply that Dr. Jensen was "at fault" for being absent for part of the trial. 31
- C. Counsel did not improperly insinuate that the Hospital had withheld or destroyed evidence. 34
- D. Counsel did not improperly insinuate that plaintiff Debra Scott was "merely" a loving wife who did not want to get paid. 41
- E. If Counsel may have misheard a statement by defense counsel, he candidly acknowledged he may have misheard, and no curative instruction or any other corrective action or mistrial was ever requested by defense counsel. 45
- F. Counsel did not improperly express personal beliefs about Dr. Jensen's trustworthiness. 47

TABLE OF AUTHORITIES

Page(s)

CASES

Adams v. Erickson,
394 F.2d 171 (10th Cir. 1968) 42

Archuleta v. Galetka,
2011 UT 73, 267 P.3d 232 36

Bandel v. Friedrich,
584 A.2d 800 (N.J. 1991) 42

Beckert v. Doble,
134 A. 154 (Conn. 1926) 42

Biddle v. Griffin,
277 A.2d 691 (Del. 1970) 42

Bowden v. Denver & R.G.W.R. Co.,
3 Utah 2d 444, 286 P.2d 240 (1955) 2

Browning v. State,
2006 OK CR 8 44

Child v. Gonda,
972 P.2d 425 (Utah 1998) 30, 31

City of Tucson v. Holliday,
411 P.2d 183 (Ariz. Ct. App. 1966) 42

Collins v. State,
2015 WY 92, 354 P.3d 55 44

Crookston v. Fire Ins. Exch.,
817 P.2d 789 (Utah 1991) 2, 3

Czekalski v. Sec'y of Transp.,
577 F. Supp. 2d 120 (D.D.C. 2008), *aff'd*, 589 F.3d 449 (D.C. Cir. 2009) 2

Diesel Mach., Inc. v. B.R. Lee Indus., Inc.,
328 F. Supp. 2d 1029 (D.S.D. 2003), aff'd, 418 F.3d 820 (8th Cir. 2005) 27, 42, 44, 47, 49

Gilberson v. Miller Mining & Smelting co.,
4 Utah 46, 5 P. 699 (1885)....3

Green v. Louder,
2001 UT 62, 29 P.3d 638....28

Hern v. Intermedics, Inc.,
No. 98-16769, 210 F.3d 383, 2000 WL 127123 (9th Cir. 2000)....27, 42, 44, 47, 49

Heslop v. Bank of Utah,
839 P.2d 828 (Utah 1992)....27, 41, 42, 44, 47, 49

Hill v. U.S.,
81 F.3d 118 (10th Cir. 1996)....42

In re Estate of Justheim,
824 P.2d 432 (Utah 1991)....3

Jackson v. U.S.,
526 F. Supp 1149 (E.D. Ark. 1981)....42

Kafka v. Truck Ins. Exch.,
19 F.3d 383 (7th Cir. 1994)....27

Nyman v. Comm'r, FDIC,
967 F. Supp. 1562 (D.D.C. 1997)....2

Reed v. Reed,
806 P.2d 1182 (Utah 1991)....2

Saltas v. Affleck,
99 Utah 381, 105 P.2d 176 (1940)....3

Shultz v. Rice,
809 F.2d 644 (10th Cir. 1986)....28

Soltys v. Costello,
520 F.3d 737 (7th Cir. 2008)....27

State v. Akok,
2015 UT App 89, 348 P.3d 377....29

State v. Carter,
776 P.2d 886 (Utah 1989), overruled on other grounds....36

State v. Diaz,
2002 UT App 288, 55 P.3d 1131, cert. denied, 63 P.3d 104 (Utah 2003)..............................44

State v. Harmon,
956 P.2d 262 (Utah 1998)..............................31, 33

State v. Hodges,
30 Utah 2d 367, 514 P.2d 1322 (1974)..............................34

State v. Lafferty,
2001 UT 19, 20 P.3d 342..............................23, 49

State v. Larsen,
2005 UT App 201, 113 P.3d 998..............................36

State v. McCon,
645 S.W.2d 67 (Mo. Ct. App. 1982)..............................32

State v. Pierren,
583 P.2d 69 (Utah 1973)..............................29

State v. Ramos,
882 P.2d 149 (Utah Ct. App. 1994)..............................32

State v. Thompson,
2014 UT App 14, 318 P.3d 1221..............................30

State v. Tilt,
2004 UT App 395, 101 P.3d 838..............................36

State v. Wright,
2013 UT App 142, 304 P.3d 887..............................29

State v. Young,
853 P.2d 327 (Utah 1993)..............................23, 49

Tingey v. Christensen,
1999 UT 68, 987 P.2d 588..............................2

U.S. v. Kopituk,
690 F.2d 1289 (11th Cir. 1982)..............................29

U.S. v. Lewis,
547 F.2d 1030 (8th Cir. 1976)..............................29

U.S. v. Solivan,
937 F.2d 1146 (6th Cir. 1991) 29

Uptown Appliance & Radio Co. v. Flint,
122 Utah 298, 249 P.2d 826 (1952) 3

Winfield v. State,
437 S.E.2d 849 (Ga. Ct. App. 1993) 32

Witherspoon v. Ill.,
391 U.S. 510 (1968) 29

RULES

Utah Rule of Civil Procedure 59 ....2, 3

Utah Rule of Civil Procedure 61 30

OTHER AUTHORITIES

Cross-Examination of Witness as to His Mental State or Condition, to Impeach Competency or Credibility, 44 A.L.R.3D 1203, § 2[b] Annotation (1972) 32

22 AM. JUR. 2D Damages § 209 42

Health & Human Servs,. Family Caregivers: Our Heroes on the Frontlines of Long-Term Care (Dec. 16, 2003), https://aspe.hhs.gov/family-caregivers-our-heroes-frontlines-long-term-care 44

Neil Vidmar, *Juries and Medical Malpractice Claims: Empirical Facts Versus Myths* 26

Richard Waites & Cynthia Zarling, *Juror Attitudes and Perceptions in Medical Malpractice Cases* 4 26

INTRODUCTION

On March 2, 2015, after four years of litigation and a 10-day jury trial, a Third District Court civil jury rendered its verdict regarding the catastrophic injury suffered by David Scott at the hands of employees of defendant hospital. The jury found in favor of plaintiffs and against defendant hospital, and awarded damages in the amount of $11,268,178.

This was a case in which defendant hospital denied any responsibility and litigated heavily. At no time did defendant hospital ever solicit or make a settlement offer in this case, and defendant hospital actively rejected any suggestion of mediation.

Now, after this Utah jury award, the defendant hospital has filed a motion for a new trial, claiming that its defenses and expert witnesses were "overwhelming," that plaintiffs' verdict could only have been achieved as a result of passion and prejudice inflaming the jury, and more specifically, that this "inflamed passion and prejudice" could only have occurred, not related to the facts, but instead as a result of alleged "misconduct" of plaintiffs' trial counsel.

In reality, this jury's verdict was driven by the undeniable facts of this case, the compelling testimony of plaintiffs' experts, the credible testimony of the Scotts themselves and their friends and business associates, the cross-examination of defendant's witnesses and experts and the jury's own common sense.

Defendant lost the case because its employees' conduct repeatedly fell below the applicable medical standard of care, causing catastrophic injury to the Scotts. Period. Defendant hospital's allegations "supporting" its motion for a new trial are contrary to Utah statute and case law, contrary to the guidance given by commentators in this area, and most importantly contrary to the

actual facts of this case, as will be set forth extensively below. For all of the foregoing reasons, defendant's motion should be denied.

THE LAW

"The right of jury trial . . . is . . . a right so fundamental and sacred to the citizen . . . [that it] should be jealously guarded by the courts."[1] Once it has been granted and a verdict rendered, the verdict "should not be regarded lightly nor overturned without good and sufficient reason; nor should a judgment be disturbed merely because of error."[2] The Court's discretion to order a new trial following a jury trial is limited to those situations "where the Court is convinced that the jury verdict was a seriously erroneous result *and* where denial of the motion will result in a *clear* miscarriage of justice"[3] [emphasis added].

Defendant hospital has moved for a new trial under Utah Rule of Civil Procedure 59. The hospital has a "heavy" burden to prove the necessity of a new trial.[4] The Court cannot grant a new trial merely because it may disagree with the jury's judgment.[5]

> Where a party has fully, completely, and without restraint been permitted to show his full grievance to a jury and they have conscientiously and without any showing of prejudice or other extraneous influences decided the matter[,] there must be some basic

---

[1] *Bowden v. Denver & R.G.W.R. Co.,* 3 Utah 2d 444, 286 P.2d 240, 244 (1955) (citations and internal quotation marks omitted).

[2] *Id.* (footnote omitted). *See also Nyman v. Comm'r, FDIC,* 967 F. Supp. 1562, 1569 (D.D.C. 1997) ("[i]n deciding whether to grant a new trial, the court should be mindful of the jury's special function in our legal system and hesitate to disturb its finding") (citation omitted). Utah Rule of Civil Procedure 59 is similar to its federal counterpart. *See* UTAH R. CIV. P. 59 compiler's n. Thus, the Court may consider cases construing the federal rule when construing the Utah rule. *E.g., Reed v. Reed,* 806 P.2d 1182, 1185 (Utah 1991) (citation omitted).

[3] *Czekalski v. Sec'y of Transp.,* 577 F. Supp. 2d 120, 122 (D.D.C. 2008) (internal quotation marks and citations omitted), *aff'd*, 589 F.3d 449 (D.C. Cir. 2009).

[4] *See id.* at 123 (citation omitted). *See also Tingey v. Christensen,* 1999 UT 68, ¶ 7, 987 P.2d 588 (a party seeking a new trial for insufficiency of the evidence has "the heavy burden of marshaling the evidence in support of the verdict and showing that the evidence, viewed in the light most favorable to the verdict, is insufficient") (citations omitted).

[5] *Crookston v. Fire Ins. Exch.,* 817 P.2d 789, 804 (Utah 1991) (citations omitted).

> and compelling reason so inherent in the evidence that the trial judge would be warranted in placing [her] judgment as to the result to be reached over and above that of the jury."[6] [emphasis added]

If the Court "cannot reasonably find that the jury erred, it should deny the motion."[7]

Although the Court has "some discretion" in ruling on a motion for a new trial,[8] it has no discretion to grant a new trial absent a showing of one of the grounds specified in the Rule 59.[9] Moreover, the exercise of judicial discretion must be based on facts, and the record should show the reasons for a new trial and make it clear that the court is not invading the province of the jury.[10]

The only grounds the defendant hospital alludes to in its motion are Rule 59(a)(1) and (7).[11] Rule 59(a)(1) says that the court "may" grant a new trial for "irregularity in the proceedings of the court, jury or opposing party, or any order of the court, or abuse of discretion by which a party was prevented from having a fair trial." Rule 59(a)(7) allows the court to grant a new trial if "the verdict or decision is contrary to law or based on an error in law." A motion for a new trial on the ground that the verdict is contrary to law must specify "in what way, or for what reason this is so."[12] As will be demonstrated, the facts and testimony supporting the jury's verdict for plaintiffs were overwhelming, and none of the factors in (1) and (7) are even remotely applicable.

---

[6] *Uptown Appliance & Radio Co. v. Flint,* 122 Utah 298, 249 P.2d 826, 829 (1952).

[7] *Crookston*, 817 P.2d at 804.

[8] *E.g., id.* at 799.

[9] *In re Estate of Justheim,* 824 P.2d 432, 433 (Utah 1991) (citation omitted).

[10] *Saltas v. Affleck,* 99 Utah 381, 105 P.2d 176, 178 (1940) (citation omitted).

[11] *See* Mot. for New Trial Pursuant to R. 59 ("Mot.") at 1.

[12] *Gilberson v. Miller Mining & Smelting co.,* 4 Utah 46, 5 P. 699, 700 (1885).

FACTUAL BACKGROUND

The undisputed facts of the case, as set forth in the medical records exhibit 1, are these: At the time of the incidents in this case, David Scott was a 56-year old CEO of a large Utah-based heavy equipment company named Scott Machinery. He was successful, active, physically fit and without disability. In the fall of 2009, David Scott's family practice physician, Dr. Kuwahara, became concerned about a mild headache which David had reported. This headache went away with ibuprofen, but would then return. Dr. Kuwahara sent David to Intermountain Medical Center for a head MRI. That head MRI was read by a Dr. Schloesser as abnormal, possibly showing a glioma, a form of brain tumor.[13] David Scott then was referred to neurosurgeon Dr. Maughan at IMC, who also considered the possibility of a brain tumor, and suggested the performance of a biopsy.[14]

Seeking a second opinion, David went to the University of Utah and met with University employee Dr. Randy Jensen, a neurosurgeon. Dr. Jensen met with David and his wife and read the IMC MRI himself. Dr. Jensen thought that the image on the film might be a tumor, but stated that it did not have many of the features that would be expected of a grade 3 glioma or grade 4 glioblastoma.[15] Dr. Jensen then offered David Scott three options, as written by him in his medical record: The first option that he offered (and described in his notes) was what is referred to as "watchful waiting." What this option meant was that a biopsy would not be performed at that time, but that serial MRIs would be performed to see whether or not this abnormality shown on

[13] *See* Defendant's Trial Exhibit 1.

[14] *See* Defendant's Trial Exhibit 1.

[15] *See* Defendant's Trial Exhibit 1.

the MRI would change. Dr. Jensen testified in his deposition that if the abnormality did not get larger, he would suggest an additional period of watchful waiting. If after that the abnormality did not change, the watchful waiting process would continue.[16]

Dr. Jensen wrote in his medical record that he specifically discouraged the option of watchful waiting.[17] When questioned in his deposition, Dr. Jensen stated that he did not know why he would have written that. He stated in his deposition that, in fact, watchful waiting would have been a completely appropriate option for Mr. Scott to follow.[18] This sworn deposition testimony changed 180 degrees when Dr. Jensen testified at trial, as will be graphically shown infra.

The two other options Dr. Jensen recommended to the Scotts involved biopsies. The first was a stereotactic biopsy, where a tissue sample is obtained through a needle. Dr. Jensen also discouraged a stereotactic biopsy.[19] The third and final option which Dr. Jensen proposed to David Scott was an open biopsy where the skull was cut open and tissue taken from the brain and analyzed as a "frozen section" (while David was in the operating room) by a pathologist standing by. That was what Dr. Jensen urged as the most appropriate methodology for David Scott and, in reliance on that recommendation, that is the option to which David Scott acquiesced.

---

[16] *See* Tr., vol. III, Feb. 19, 2015 at 131:3-22.

[17] *See* Defendant's Trial Exhibit 1.

[18] *See* Tr., vol. III, Feb. 19, 2015 at 124:7-13; 125:4-20.

[19] *See* Defendant's Trial Exhibit 1.

On March 3, 2010, an additional MRI was performed at defendant hospital,[20] ostensibly to aid Dr. Jensen in localizing the abnormality in David Scott's brain.[21] That MRI was never compared by Dr. Jensen with the previous MRI taken on February 21, 2010.[22]

On March 4, 2010, as stated in the Operative Report, Dr. Jensen and his neurosurgery assistant, Dr. Janet Lee, began the open biopsy on David Scott. Dr. Jensen removed an initial part of David Scott's brain tissue, and sent it as a "frozen section" to University pathologist Dr. Chin for analysis. Dr. Chin reported increased cellularity and gliosis, which Dr. Jensen admitted are consistent with an inflammatory process[23] <u>and that no neoplasm (cancer) was present</u>.[24] Dr. Jensen testified that even at that point <u>he did not consider that this abnormality might not be a tumor</u>.[25] Thus undeterred, Dr. Jensen took more tissue samples, partially "de-bulking" or cutting out more of David Scott's brain. It is at that time that either Dr. Jensen, Dr. Lee, or both, did something to occlude the left middle cerebral artery, causing a massive ischemic stroke.

Cancer was never found in David Scott's brain. The surgery Dr. Jensen performed was completely unnecessary.

These tragic events left David Scott with major catastrophic neurological injuries. The joint medical record exhibit 1 details that he spent weeks in in-patient rehab, and years in intensive out-patient physical therapy, occupational therapy, speech therapy and other rehabilitation

---

[20] *See* Defendant's Trial Exhibit 1.

[21] *See* Defendant's Trial Exhibit 1.

[22] *See* Tr., vol. III, Feb. 19, 2015 at 156:2-12.

[23] *See id*. at 168:16-22.

[24] *See id*. at 176:8-15.

[25] *See id*. at 169:2-5

modalities. At the time of the trial in this case, a "Day in the Life" video was admitted and shown to the jury, demonstrating the efforts that David Scott had to undertake just to get dressed in the morning. His wife Debra showed the work that she does with David in helping him read (at a second grade level for this college and MBA graduate) and the difficulty that David has in expressive language, ambulation, fine motor skills, etc. The video does not describe the level of pain that David has to deal with as a result of these neurologic injuries on a daily basis for the rest of his life.[26]

That was the situation that existed at the time the trial of this case commenced on February 17, 2015. The plaintiffs' witnesses included David Scott and Debra Scott; David's brother and now CEO of Scott Machinery Jeff Scott; Office Manager Becky Patrick; David's best friends David Bird and David Folger; Life Care Planner Helen Woodward and economist Richard Hoffman. Defendant hospital is nowhere complaining about either the form or substance of the testimony of any of these lay and expert witnesses. Their testimony regarding David Scott's injuries, rehabilitation, special damages pursuant to the Life Care Plan and general damages in terms of pain, mental anguish and loss of enjoyment of life, were then presented to the jury members for their consideration.

PLAINTIFFS' LIABILITY AND CAUSATION WITNESSES

The testimony of plaintiffs' multiple liability and causation experts will be discussed directly below. However, the real "star" of plaintiffs' case was defendant hospital's neurosurgeon Dr. Randy Jensen himself. Dr. Jensen, after being placed under oath, initially stated, "I would not

---

[26] *See* Tr., vol. IV, Feb. 20, 2015 at 12:25-13:1.

dispute something that I personally said,"[27] and then proceeded in open court to dispute almost all of the critical portions of his sworn deposition testimony as well as the medical records he had personally dictated.

For instance, Dr. Jensen initially agreed that observation was a reasonable option for David Scott:[28] When then presented with his sworn deposition testimony in which he stated he usually tells patients that observation is a reasonable option but denied he had told the Scotts this, Dr. Jensen tried unsuccessfully to retreat from what he had previously testified to both in his deposition and trial.[29] When then asked why he would discourage the very reasonable option of observation, he then became so fixated on the fact that he used the word "discouraged" that he could not answer the simple question of whether not telling the Scotts about this reasonable option was a breach in the standard of care.[30] When he took the stand for the defense, he testified observation was *not* a reasonable option for David Scott.[31] On cross-examination he was once again presented with his deposition testimony that observation was a reasonable option contradicting (again) his testimony for defendant.[32] This sequence of seemingly endless contradictory responses was emblematic of his entire testimony, and set the stage for defendant's loss in this case.

More examples: Dr. Jensen was asked by plaintiffs' counsel if he had admitted in his deposition that one of the sources of David Scott's stroke could be that a blood vessel was cut,

---

[27] Tr., vol. II, Feb. 18, 2015 at 175:13-17.

[28] *See* Tr., vol. III, Feb. 19, 2015 at 120:25-121:3.

[29] *See id.* at 122:18-129:10.

[30] *See id.* at 138:12-143:22.

[31] *See* Tr., vol. VIII, Feb. 26, 2015 at 167:4-7; 250:15-20.

[32] *See id.* at 250:21-253:10.

which he adamantly denied, "Oh, no, I wouldn't have said that."[33] He was then presented with his sworn deposition testimony in which he specifically stated that one of the sources could have been the cut of the middle cerebral artery or a distal vessel.[34]

Plaintiffs' counsel suggested that a period of observation would have allowed sufficient time for whatever is was that was going on in Mr. Scott's brain to resolve.[35] Dr. Jensen adamantly stated "that's not correct at all" and that the abnormality has *not* resolved.[36] When presented with his own medical note from a follow-up visit in which he states "The pathology is consistent with a chronic and acute meningoencephalitis, which appears now to be resolved…,"[37] Dr. Jensen claimed he did not know what the word "resolved" meant, even though it was his own dictation.[38] Dr. Jensen denied there was a diagnosis of meningoencephalitis even after he was presented with his own medical record specifically stating that diagnosis, as well as the defendant's pathology record.[39] Dr. Jensen said that he could not agree with the statement "a physician should never needlessly endanger the safety of a patient," because he didn't know what the word "needlessly" meant.[40]

---

[33] Tr., vol. II, Feb. 18, 2015 at 184:14.

[34] *See id.* at 184:22-185:14.

[35] *See* Tr., vol. III, Feb. 19, 2015 at 131:23-132:2.

[36] *Id.* at 132:3-6.

[37] *Id*. at 132:11-133:2; *see also* Defendant Trial Exhibit 1.

[38] *See id.* Tr., vol. III, Feb. 19, 2015 at 133:19-134:6.

[39] *See id.* at 132:11-133:2; 175:7-176:7.

[40] Tr. Feb., vol. II, 18, 2015 at 234:10-23; 237:11-238:14; 243:18-244:3.

More examples: At trial, Dr. Jensen adamantly claimed, twice, that he specifically remembered discussing the risks of the surgery with the Scotts.[41] He was then presented with his deposition testimony from over three years earlier in which he stated he did not specifically remember discussing the risks.[42] Dr. Jensen admitted that this could have been an infectious process, but conceded that infection was nowhere on his differential diagnosis.[43] In fact, Dr. Jensen conceded that the only thing that ever was on his differential diagnosis were "tumor, tumor, and tumor."[44] He testified that he never told the Scotts there was a possibility it might not be a tumor.[45] Dr. Jensen admitted that during the surgery itself the tissue looked more like normal brain tissue than cancerous tissue.[46] He admitted that the frozen section he obtained was consistent with an inflammatory process.[47] Dr. Jensen admitted that the most likely explanation for David Scott's stroke, the explanation that the jury "can take to the bank," was "surgical manipulation,"[48] and he agreed that he was the surgeon in this case. Dr. Jensen admitted that he was wrong and that what David Scott had was not cancer.[49]

The bottom line is that Dr. Jensen's non-credible testimony was clearly a major factor in the jury's decision. It could not have been otherwise.

---

[41] *See* Tr., vol. III, Feb. 19, 2015 at 157:16-24.

[42] *See id.* at 157:25-158:6.

[43] *See* Tr., vol. II, Feb. 18, 2015 at 251:9-16; *see also* Tr., vol. VIII, Feb. 26, 2015 at 245:14-20.

[44] *See* Tr., vol. II, Feb. 18, 2015 at 257:12-15; *see also* Tr., vol. VIII, Feb. 26, 2015 at 245:21-24.

[45] *See* Tr., vol. III, Feb. 19, 2015 at 144:5-20.

[46] *See* Tr., vol. VIII, Feb. 26, 2015 at 253:14-19.

[47] *See id.* at 254:14-22.

[48] Tr., vol. II, Feb. 18, 2015 at 187:13-19; *see also* Tr., vol. VIII, Feb. 26, 2015 at 256:19-25.

[49] *See* Tr., vol. VIII, Feb. 26, 2015 at 244:14-245:2; *see also* Tr., vol. III, Feb. 19, 2015 at 174:1-11.

Turning to plaintiffs' experts, the Scotts presented to the jury neuro-radiologist Dr. Roland Lee. Dr. Lee received a degree in Physics from Cal Tech and a Master's Degree in physics from the University of California at Berkeley. He then received his medical degree from UCLA and did his residency in Diagnostic Radiology at Brigham & Women's Hospital/Harvard Medical School in Boston, Massachusetts. Dr. Lee completed an MRI fellowship at Memorial Magnetic Resonance Center in Long Beach, California and Magnetic Resonance Spectroscopy research at Huntington Medical Research Institute in Pasadena, California. He also completed a neuro-radiology fellowship at the University of California at San Francisco, Department of Radiology in San Francisco, California. Between 1992 and 1997, he was Assistant Professor of Radiology at Johns Hopkins Hospital, as well as Director of Spine CT - MR and Associate Director of MRI, neuro-radiology division at Johns Hopkins. Dr. Lee then became an Associate Professor of Radiology at the University of New Mexico and Director of the Center for Functional Brain Imaging, including MEG/f MRI/MR Spectroscopy at that institution and was later promoted to full professor with tenure. In 2004, Dr. Lee became Professor of Radiology at the University of California, San Diego (UCSD) and Director of Magnetoencephalography (MEG, UCSD). He is also Section Chief of MRI and Neuro-radiology at the VA, San Diego Healthcare System, and Neuro-radiology Fellowship Director and Vice-Chair of Neuro-radiology, UCSD.[50]

---

[50] *See* Tr., vol. II, Feb. 18, 2015 at 18:4-22:10.

Dr. Lee opined that the MRI of David Scott taken on February 19, 2010, in his opinion, was most consistent with encephalitis, in particular possible herpes encephalitis.[51] He further testified that the pathological findings further corroborated his assessment of the imaging.[52]

Dr. Lee compared for the jury the MRI images taken on February 19, 2010 with the pre-operative MRI of March 3, 2010, (which Dr. Jensen admitted he had never done) and testified that in his opinion the abnormality shown on the film had in fact gotten smaller, which meant the abnormality was more likely an inflammatory process and less likely a tumor.[53] He disagreed with Dr. Jensen's misreading of this film as showing "astrocytoma/glioblastoma versus lymphoma" without including meningoencephalitis.[54] He further testified that it was incumbent upon Dr. Jensen, since Dr. Jensen was acting as a neuro-radiologist in personally reading these neuro-radiological films, to put inflammation or infectious process in the differential diagnosis, and that the failure to do so was a breach in the standard of care.[55]

Plaintiffs called Dr. Michael Horowitz to testify about pre-surgical breaches in the standard of care. Dr. Horowitz received a degree in Biology from Williams College (cum laude with highest honors) and attended the University of Rochester School of Medicine where he obtained his medical degree. He completed his general surgery internship at the University of Pittsburgh Medical Center, his neurological surgery residence at the University of Pittsburgh Medical Center and his fellowship in neuro-endovascular surgery and interventional neuro-radiology at the

---

[51] *See id.* at 69:7-70:1.

[52] *See id* at 72:4-9.

[53] *See id.* at 88:14-90:8.

[54] *See id* at 69:7-70:1; 82:12-19; 83:13-20; 86:22-87:9.

[55] *See id.* at 90:19-91:6

University of Texas Southwestern Medical Center. Dr. Horowitz is presently Professor of Neurosurgery and Radiology with tenure at the University of Pittsburgh Medical Center and Co-Director of Neurovascular Surgery and Director of Neuro-endovascular surgery at that institution. He is also Associate Director at the University of Pittsburgh Medical Center's Center for Cranial Nerve Disorders and is the Advisory Board Member of the Stroke Institute at the University of Pittsburgh Medical Center. Dr. Horowitz has authored 26 book chapters and one book in neurosurgery and neuro-radiology and has given over 100 invited lectures on neurosurgical topics around the world.[56]

Dr. Horwitz stated that David Scott's MRI from February 19, 2010 showed an abnormality that was most likely an inflammatory or infectious process, and only possibly a tumor.[57] The abnormality which was evident on the MRI had little mass effect, no significant enhancement and actually did not have the characteristics of a malignant glioma or glioblastoma.[58] Even if it was a high grade glioma or glioblastoma, he stated there was no urgency to operate.

Dr. Horowitz further testified that not including infection or inflammation on the differential diagnosis was a breach in the standard of care that contributed to Mr. Scott's injury.[59] He testified that prior to doing a biopsy, it was incumbent upon Dr. Jensen to perform certain non-invasive tests, including cultures of blood and urine, a lumbar puncture to test cerebral spinal fluid (CSF), an EEG, and dentition.[60] The reason for that was to look for markers that were indicative

---

[56] See Tr., vol. III, Feb. 19, 2015 at 6:3-7:2; 9:11-19.

[57] *See id.* at 28:11-29:15.

[58] *See id.* at 28:24-29:15.

[59] *See id.* at 29:16-24; 104:17-105:5.

[60] *See id.* at 29:25-34:16.

of infection or inflammation that could be treated with medication before opening up his head and cutting into his brain.[61] None of these tests or further assessments or treatments were ordered or performed by Dr. Jensen, all of which Dr. Horowitz stated were multiple breaches in the applicable medical standards of care that caused injury to Mr. Scott.[62]

Neurosurgeon expert Dr. Stephen Bloomfield testified on behalf of plaintiffs. Dr. Bloomfield is a graduate of Rutgers College, where he received a degree in Biological Sciences and a Bachelor of Arts in Psychology. He also received a degree in Psychobiology and Biomechanical Engineering as well as his medical degree from Rutgers Medical School. He did his surgical internship at Rutgers and neurology residency at New Jersey Medical School. His neurosurgical residency was done at Barrow Neurological Institute in Phoenix, Arizona. He completed a Fellowship in neurochemical evaluation of seizure disorders, evaluation and neurosurgical treatment of intractable epilepsy and stereotactic and functional neurosurgery and neuro-oncology. He is currently Associate Professor of Neurosurgery at Seton Hall University and has published several book chapters and journal articles on neurosurgical topics.[63]

Dr. Bloomfield testified to the safety and efficacy of a stereotactic (needle) biopsy as opposed to the open biopsy procedure advocated by Dr. Jensen. He stated that performing an aggressive resection of the temporal lobe would significantly increase the risk of injuring blood vessels near the brainstem and increase the risk of injuring the middle cerebral artery.[64] In Mr. Scott's case, Dr. Bloomfield opined that it was a breach of the standard of care, that caused

---

[61] *See id.* at 34:8-20.

[62] *See id.* at 34:21-35:7; 105:11-15.

[63] *See* Tr., vol. IV, Feb 20. 2015 at 39:20-41:12.

[64] *See id.* at 91:8-20.

damage, to perform an aggressive resection of the left temporal lobe because, as Dr. Jensen himself indicated before the operation, it would be impossible to remove the entire abnormality.[65] Dr. Bloomfield testified that surgical resection is appropriate, "if, and only if, 75 percent or more of the volume of the tumor could be safely removed" and it does not "offer any benefit above and beyond the biopsy if only 50 percent of the tumor is removed."[66] He testified that Dr. Jensen performed a brain de-bulking procedure that had no benefit and added unnecessary harm and risk to the operation.[67]

Dr. Bloomfield testified Dr. Jensen breached the standard of care by discouraging the Scotts from the option of a stereotactic biopsy.[68] Dr. Jensen failed to seriously consider a stereotactic needle biopsy as a first step, which failure led to a lost opportunity to make the diagnosis of the nature of this abnormality with significantly lower surgical risks. The operation performed by Dr. Jensen improperly subjected Mr. Scott to the greater risks of the left temporal tip lobectomy. These were all breaches in the applicable medical standards of care that caused damage.

Dr. Bloomfield also testified that Dr. Jensen breached the standard of care by not providing the Scotts with adequate information about what their options were,[69] and again when he did not include infection/inflammation on his differential diagnosis.[70]

---

[65] *See id.* at 85:14-86:2.

[66] *Id.* at 73:8-74:11.

[67] *See id.* at 85:16-86:2.

[68] *See id.* at 91:21-25.

[69] *See id*. at 53:15-25.

[70] *See id*. at 53:24-54:10.

Further, Dr. Bloomfield testified Dr. Jensen breached the standard of care when he surgically removed normal brain tissue outside the lesion,[71] and again breached the standard of care when he continued to remove more of Mr. Scott's left temporary lobe even when the biopsy results reported to him demonstrated that there was no neoplasm (cancer).[72] Even with this knowledge that no cancer was found, Dr. Jensen continued to remove more of Mr. Scott's brain including a section of the brain that contained a wall of the middle cerebral or connected artery. It was that injury to this blood vessel that caused Mr. Scott's stroke and severe neurological disability.[73] Dr. Bloomfield testified that even an open biopsy could have been performed with techniques that would've significantly reduced the risks of a complication.[74] Dr. Bloomfield concluded that it was these multiple failures by Dr. Jensen, especially the failure to protect the middle cerebral artery from injury during his surgery, that were the proximate causes of Mr. Scott's stroke in the dominant hemisphere which caused him to become paralyzed on the right side of his body, and to develop significant language deficits and cognitive dysfunction.[75] He further testified that, had Dr. Jensen not breached these multiple medical standards of care, Mr. Scott would more probably than not be neurologically intact.[76]

All of plaintiffs' experts were highly qualified; all of plaintiffs' experts testified about multiple breaches in the standards of care by employees of defendant hospital (especially Dr.

---

[71] *See id.* at 86:3-5.

[72] *See id.* at 86:6-9.

[73] See id. at 86:10-87: 2.

[74] *See id.* at 88:2-19.

[75] *See id.* at 86:18-87:2.

[76] *See id.* at 87:3-21.

Jensen) to a reasonable degree of medical probability. All of plaintiffs' expert witnesses testified that these breaches in the standard of care proximately caused injury to Mr. Scott, and if they had not occurred, it is more probable than not that Mr. Scott would have avoided injury. None of these experts testified that they were providing this information based on a "community standard," "community safety," or anything other than highly qualified expert testimony based upon their background, training, education, experience and review of the specific facts of this case. None of these experts' qualifications or testimony were contested by the defendant (either by a prior Daubert/Rimmasch-type motion, motion in limine, motions to disqualify them at trial, or motions to strike their testimony).

At the end of plaintiffs' case in chief, defendant hospital moved for a directed verdict.[77] In response, plaintiffs pointed out that all of their experts said that an infectious/inflammatory process should have been on Dr. Jensen's differential (it was not); plaintiffs' experts opined that a number of pre-surgical, largely non-invasive tests should have been performed by Dr. Jensen (they were not); plaintiffs' experts testified that observation should have been offered by Dr. Jensen (it was actively discouraged); Dr. Bloomfield testified that a stereotactic needle biopsy should have been the first choice if the decision was made to do a biopsy at all (it was not); that when Dr. Jensen received the word that the frozen section he had cut from Mr. Scott's brain contained no evidence of cancer, he should have stopped (he did not); Dr. Bloomfield agreed with hospital employees Dr. Jensen and Dr. Chin that the piece of artery contained in the biopsy was probably from a portion of the middle cerebral or related artery and that "surgical manipulation" was the probable

[77] *See* Tr., vol. V, Feb. 23, 2015 at 195:1-5.

cause of Mr. Scott's catastrophic neurologic stroke.[78] Defendant Hospital's motion for a directed verdict was denied.[79]

DEFENDANTS' EXPERT WITNESSES

Apart from defendant's unmitigated disaster that was Dr. Jensen's trial testimony, the defendants' experts included, most importantly, Dr. Andrew Sloan, who was a neurosurgeon and a personal friend and business partner with Dr. Jensen.[80] Dr. Sloan testified that because of his personal relationships with Dr. Jensen, he raised concerns with defendant hospital's counsel about his credibility and acknowledged that he had at least the appearance of a conflict in testifying on Dr. Jensen's behalf.[81] Dr. Sloan testified that he agreed to be an expert on behalf of Dr. Jensen before he had even seen any medical records.[82] He admitted that he had read no depositions prior to generating his opinions in the case,[83] and he admitted that he misunderstood the facts and thought that David Scott was getting worse (rather than better)[84] which would indicate an urgency to operate.

Dr. Sloan testified that Dr. Jensen not giving the risks and benefits of particular alternatives was a breach of the standard of care.[85] He testified that the standard of care required that the Scotts be told that watchful waiting was a reasonable option,[86] which Dr. Jensen discouraged. Dr. Sloan

---

[78] *See id.* at 199:11-204:1.

[79] *See id.* at 206:22-207:11.

[80] *See* Tr., vol. VII, Feb. 25, 2015 at 109:2-20.

[81] *See id.* at 33:1-17; *See also id.* at 113:13-114:6, 117:7-15.

[82] *See id.* at 119:17-121:18.

[83] *See id.* at 136:20-137:9.

[84] *See id.* at 103:25-104:10.

[85] *See id.* at 151:17-152:2.

[86] *See id.* at 156:10-18.

testified that the differential diagnosis should have included infectious/inflammatory process.[87] He further testified that it was a breach of the standard of care not to inform the Scott family of this differential diagnosis and of the inclusion of a possible infectious/inflammatory process on that differential diagnosis.[88]

Dr. Sloan disagreed with Dr. Jensen that there was no other possible diagnosis than "tumor, tumor, tumor"[89] and again that it was a breach of the standard of care not to inform the family of that fact.[90]

The defendants also called radiologist Dr. Whitney Pope. Dr. Pope was not a neurosurgeon and was not opining in this case on any surgical or pre-operative conduct of Dr. Jensen. Dr. Pope candidly admitted that based on imaging, infectious/inflammatory process should have been on the differential,[91] and that Dr. Jensen could not "lock" out other diagnoses based upon the imaging.[92] He acknowledged there was a lot of "overlap" in terms of imaging between viral infection and glioma.[93] He also acknowledged that there were many different kinds of viral infections,[94] and a patient might not have a fever, chills, night sweats, or other signs that a physician might see with a viral infection.[95]

---

[87] *See id.* at 159:10-19.

[88] *See id.* at 167:6-19.

[89] *See id.* at 158:15-25, 160:4-12.

[90] *See id.* at 167:2-19, 169:21-170:6.

[91] *See* Tr. vol. VI, Feb. 24, 2015 at 107:22-108:8.

[92] *Id.* at 98:18-23.

[93] *Id.* at 98:2-9.

[94] *See id.* at 102:9-22.

[95] *See id.* at 104:15-105:22.

Former University of Utah employee pathologist Dr. Chin was called. Dr. Chin admitted that he never found cancer on the tissue samples taken of Mr. Scott's brain.[96] He also stated that he remembered seeing a piece of artery wall in one of the tissue samples which Dr. Jensen had cut out of Mr. Scott's brain.[97] Dr. Chin stated that few infections are found on biopsy, since doctors generally can make a diagnosis without a biopsy.[98] This can be done through a variety of tests, including a spinal tap.

Dr. Chin stated that there was no evidence that Mr. Scott was suffering from leukodystrophy (a defense strawman), which primarily affects white matter myelination. He saw no evidence of that on Mr. Scott's pathology slides,[99] that it predominately affects children,[100] and that it is a progressive disorder, [101] meaning that it would have gotten worse if Mr. Scott had had it.

Defendant hospital called Dr. Roos, who was an infectious disease physician. Dr. Roos stated that Mr. Scott "did not have a herpes simplex virus infection or another form of encephalitis or infection in his brain . . . he absolutely did not have that."[102] She stated she specifically disagreed with the findings of the defendant hospital's own infectious disease team,[103] and disagreed with

[96] *See id.* at 167:9-14.

[97] *See id.* at 177:5-17; 178:3; 179:18-19; 182:17-19.

[98] *See id.* at 141:1-12; 186:18-25; 187:8-14.

[99] *See id.* at 200:4-9.

[100] *See id.* at 200:12-15.

[101] *See id.* at 200:24-201:7.

[102] Tr., vol. X, Mar. 2, 2015 at 44:5-25.

[103] *See id.* at 88:16-18.

the findings of the defendant hospital's neurosurgery group.[104] She also disagreed with the deposition testimony that herpes was always fatal according to published literature,[105] and she disagreed with every expert who opined on the subject (including defendant's own experts) that Mr. Scott had meningoencephalitis.[106]

IMC fact witness Dr. Schloesser, the neuroradiologist who made the erroneous reading of the MRI film from February 19, 2010, stated that as a practical matter, it was up to the neurosurgeon (i.e., Dr. Jensen) to make a decision about what the film actually showed.[107] He agreed that enhancement, edema and elevated choline, each of which he mentioned in his reading of the MRI, can all be caused by infection or inflammation.[108] Dr. Schloesser never provided any recommendations regarding what type of care, if any, Mr. Scott required, or whether or not any kind of surgical intervention was warranted.[109]

IMC fact witness Dr. Peter Maughan testified that infectious/inflammatory process would be considered on his differential.[110] However, Dr. Maughan never proceeded with any medical care of Mr. Scott, and performed no procedures upon Mr. Scott. As a practical matter, if Dr. Maughan had stood in the place of Dr. Jensen and made the mistakes and breaches of medical standards of care Dr. Jensen made, Dr. Maughan would have been the defendant in this case.

---

[104] *See id.* at 91:9-21.

[105] *See id.* at 94:12-95:18.

[106] *See id.* at 88:3-19; 100:23-101:4; 102:8-12; 103:16-25.

[107] *See* Tr., vol. VI, Feb. 24, 2015 at 234:9-22.

[108] See id. at 238:10-239:10

[109] *See id.* at 239:11-22.

[110] See Tr., vol. VII, Feb. 25, 2015 at 247:5-10.

The Court denied defendant hospital's motion for a directed verdict at the close of all of the testimony in the case.

It is clear from the verdict that the plaintiffs' case against defendant hospital was overwhelming, and the jury's verdict in this case was fully justified. At no time was the conduct of plaintiffs' counsel, other than basic lawyering, any improper factor whatsoever in this case.

ALLEGATIONS OF "ATTORNEY MISCONDUCT"

I. THE STATEMENTS OF PLAINTIFFS' COUNSEL DO NOT JUSTIFY A NEW TRIAL.

As set forth above, there are more than ample factual and testimonial grounds to fully support the jury's verdict in this case. The entire grounds for the defendant hospital's motion for a new trial are some nine statements that plaintiffs' counsel made during the course of this ten-day jury trial. In the overall course the statements are benign, and were largely made without any objection (until now, a year later) by opposing counsel. The plaintiffs will address each of the statements in turn and show that they did not violate either Utah law or this Court's order in limine. Moreover, even if arguendo there was some minor error (not uncommon in a trial of this magnitude and complexity), it was *de minimus,* or was not objected to, or was waived, or was fully cured by the Court's instructions. The Court should therefore deny the defendant's motion for a new trial.

A. Counsel did not make improper "conscience of the community" or "send a message" arguments.

Defendant hospital complains about two statements plaintiffs' counsel made in closing argument that it claims were improper "conscience of the community" or "send a message" arguments. The first was when plaintiffs' counsel told the jury:

> You're going to be deciding a case about Dave [Scott], and you're going to be deciding a case about Debra [Scott] [the plaintiffs], but

> you're going to be deciding a bigger issue too, and that bigger issue you're going to be deciding is do we as a population have the right to be informed of the medicine and our condition and do we have the right to have a say in what's done to our bodies?
>
> And the standard of care is yes, we do. When answering that question for Dave and Debra, you're answering that question globally for all of us. For my family, you're answering that question.[111]

1. The first statement was not improper.

Trial counsel are given "considerable latitude in making arguments to the jury."[112] An attorney "has the right to draw inferences and use the information brought out at trial in his closing argument."[113]

Just before plaintiffs' counsel made the statement defendant hospital complains of, counsel reviewed with the jury Dr. Jensen's testimony that generally observation is a valid option for someone in Mr. Scott's position but that he discouraged it because it didn't apply to Mr. Scott.[114] Counsel reviewed his examination of Dr. Jensen and the defense expert, Dr. Sloan, and showed that observation was a valid option for Mr. Scott, that a proper differential diagnosis would have identified three possible causes of his headaches—infectious process, inflammation, and neoplasm—only one of which might have required surgery.[115] He also referred to Dr. Sloan's testimony that the standard of care required that the family be told that observation was an available option so that Mr. Scott could make a decision for his own life.[116]

---

[111] Tr. of Closing Arguments, Mar. 2, 2015, p.m., at 23:22-24:7.

[112] *State v. Young*, 853 P.2d 327, 349 (Utah 1993).

[113] *State v. Lafferty*, 2001 UT 19, ¶ 86, 20 P.3d 342 (citations omitted).

[114] Tr. of Closing Arguments, Mar. 2, 2015, p.m., at 20:21-23:15.

[115] *See id.* at 17:2-19:5; 21:7-22:1.

[116] *Id.* at 23:15-21; *see also id.* at 19:15-19.

The first statement defendant hospital complains of was a permissible comment on the evidence and was not improper. It was meant to emphasize that the standard of care is not case specific but applies across the board, and that there was not a different standard for Mr. Scott than for everyone else.

It has long been recognized that tort law has two equally important purposes--compensation and deterrence. As Judge Posner has explained, "If compensation is the only purpose of the negligence system, it is a poor system, being both costly and incomplete. Its economic function, however, is not compensation but the deterrence of inefficient accidents."[117] Similarly, Deans Prosser and Keeton recognized long ago that

> [t]he "prophylactic" factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm. Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive.[118]

Thus, in deciding that the standard of care required the defendant to inform Mr. Scott "of the medicine and [his] condition" and give him "the right to have a say in what's done to [his body]," as Dr. Sloan, the defense expert, testified it did, the jury was answering that question for more than just Mr. Scott.

---

[117] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 187 (1986).

[118] W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 4, at 25 (5th ed. 1984); WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS 23 (3d ed. 1964).

Defense counsel recognized as much in his closing. He told the jury, "this is a significant case, not just for one side, *for everybody here*."[119] He said that "a lot of what we're going to be talking about pertains to [Dr. Jensen's] judgment as a physician" and that Dr. Jensen "made judgments . . . on what the standard of care is when evaluating *a patient like* Mr. Scott."[120] He emphasized that the standard of care is what a reasonable prudent doctor practicing in the same field would do in "a certain situation,"[121] not just in this case. He effectively asked the jury to put themselves in Mr. Scott's position by such statements as:

> [W]e go to people like this because we have to rely on their training and experience on what these things are supposed to look like and how you're supposed to treat them because that's what they go to school for, that's what they do residencies and fellowships for. That's what some of them write about and teach about is [to] try to figure out the way to handle these.[122]

In discussing IMC Dr. Maughan's recommendation that Mr. Scott undergo surgery, defense counsel told the jury that Dr. Maughan discussed "the risks and benefits of surgery" with the Scotts and then added that "risks are the thing <u>any of us that have surgery</u>, [the jurors? Mr. Rooney? Mr. Rooney's family?] we've had to listen to that discussion, and none of us think we're going to be that person."[123] He said that in this case Dr. Jensen said he followed "the process I follow every time a patient comes in."[124] He paraphrased Dr. Jensen's testimony that, "if this person comes in

---

[119] Tr. of Closing Arguments, Mar. 2, 2015, p.m., at 41:11-12 (emphasis added).

[120] *Id.* at 42:8-15 (emphasis added).

[121] *See id.* at 52:10-24.

[122] *Id.* at 56:19-57:1.

[123] *Id.* at 57:7-19 [emphasis added].

[124] *Id.* at 61:4-5.

my office again tomorrow, I'm going to tell him, 'I think you have a tumor and what we need to try and figure it out is to get tissue.'"[125]

Thus, in suggesting to the jury that their decision on the standard of care could have implications beyond this particular case, plaintiffs' counsel was merely arguing a reasonable inference from the evidence, the same as Mr. Rooney was doing when he suggested that jurors can trust their medical providers because of the superior training and experience.

2. The second statement was not improper.

The second statement defendant hospital complains of was when plaintiffs' counsel told the jury: "It's going to take moral courage for you guys to come back with a verdict against the medical community. It is. Because that whole thing, we don't want to think about it. We don't want to think about that for my family, Charlie's family, for anybody's family."[126]

There was nothing improper about the argument. Defense counsel acknowledged in his closing argument that we don't want to think that a risk of surgery (which would include a doctor not following the standard of care) would ever happen to us and that Dr. Jensen never wanted Mr. Scott to be harmed and feels remorse about the fact that he was.[127] It always takes moral courage to return a verdict against a healthcare provider because they are generally only trying to save or fix lives, and no one ever wants to think that an untoward event could happen to him or her.[128]

---

[125] *Id.* at 68:6-9.

[126] *Id.* at 36:18-23.

[127] *See id.* at 57:10-24; 76:18-77:11.

[128] *See, e.g.,* Neil Vidmar, *Juries and Medical Malpractice Claims: Empirical Facts Versus Myths,* 467 CLINICAL ORTHOPAEDICS & RELATED RES. 367, 369 (2009) (one study of juror attitudes in medical malpractice trials showed that one of jurors' main themes was that most doctors try to help people and should not be blamed for simple human misjudgment or a momentary lapse of concentration) (citations omitted); Richard Waites & Cynthia Zarling, *Juror Attitudes and Perceptions in Medical Malpractice Cases* 4 ("[J]urors are generally hesitant to find liability against health-care providers. Jurors generally want to believe that doctors, hospitals, and other health-care providers

3. The Hospital waived any objection to the statements.

A party may not seek a new trial on grounds not brought contemporaneously to the trial court's attention.[129] There was no objection from defense counsel at the time plaintiff's counsel made either statement, when the Court could have stopped counsel if his argument was hypothetically improper, and cautioned the jury. Defense counsel waited until after plaintiffs' counsel finished his argument to raise any issue about the statements[130] and waited until the jury was excused to move for a mistrial.[131] So the defendant hospital has waived any objection to the argument.

4. The statements did not violate the Court's order in limine.

Defendant hospital argues that plaintiffs' counsel violated the Court's order on Defendant's Motion in Limine Re: Reptile Theory. Plaintiffs' counsel did no such thing. The order, which defense counsel drafted, denied defendant's motion on "Reptile" arguments.

> With the following restrictions ordered by the Court: (1) the parties may discuss safety as it related to the standard of care; (2) the parties shall not urge the jury to ignore the standard of care established by expert testimony presented at trial and instead apply either a general

---

will provide them with safety and comfort in their time of need. They do not want to believe that doctors and hospitals make mistakes that injure or kill patients."), http://www.theadvocates.com/ Juror%20Attitudes%2oand%20Perceptions%2oin%20Medical %20Malpractice%20Cases.pdf.

[129] *See, e.g., Soltys v. Costello*, 520 F.3d 737, 745 (7th Cir. 2008) (a party who did not object to statements in closing argument "at the time" waived his challenge to them); *Hern v. Intermedics, Inc.*, No. 98-16769, 210 F.3d 383, 2000 WL 127123, at *2 (9th Cir. 2000) (table) (a party should object to alleged instances of attorney misconduct before the jury deliberates to allow the district court to examine the alleged prejudice and to admonish counsel or issue a curative instruction; absent an explanation for the failure to object, the failure to make a contemporaneous objection "firmly bars relief for misconduct") (citations omitted); *Diesel Mach., Inc. v. B.R. Lee Indus., Inc.*, 328 F. Supp. 2d 1029, 1038 (D.S.D. 2003) ("Without an objection during argument, the Court has no opportunity to rule nor admonish the jury if the situation warrants."), aff'd, 418 F.3d 820 (8th Cir. 2005); *Heslop v. Bank of Utah*, 839 P.2d 828, 839 (Utah 1992) ("Absent an objection by defendant, we will presume waiver of all arguments regarding the appropriateness of counsel's statements unless the error falls into the category of plain error."). It is questionable whether the plain error doctrine applies in a civil case such as this. *See, e.g., Kafka v. Truck Ins. Exch.*, 19 F.3d 383, 385-86 (7th Cir. 1994) (the plain error doctrine generally does not apply in civil cases). In any event, the Hospital has not argued plain error.

[130] Tr. of Closing Arguments, Mar. 2, 2015, p.m. at 37:23-40:9.

[131] *See id.* at 94:2-95:21.

> safety standard or a community standard based on jurors' own beliefs about what constitutes an acceptable level of medical care; (3) the parties shall not make golden rule arguments; (4) the parties shall not argue or suggest that the jury serves as the conscience of the community in rendering a verdict; (5) the parties shall not argue or suggest to the jury that it send a message to medical providers through its verdict; (6) the parties shall not present arguments that appeal to or inflame passions or prejudices; and (7) the parties shall abide by Utah appellate court decision relating to closing arguments.[132]

As set forth extensively above, plaintiffs' counsel's only discussion of safety related to the applicable medical standards of care:[133] Plaintiffs' counsel did not urge the jury to ignore the standard of care established by expert testimony and apply a general safety standard or community standard based on jurors' own beliefs. In fact, counsel repeatedly told the jury that its role was to determine whether Dr. Jensen breached the standard of care in his treatment of David Scott, that the standard of care is established through expert testimony, that "[y]ou can't make up your own standard of care," but that it is "based on what you hear experts say, 'This is what a reasonably prudent physician should do under the same or similar circumstances."[134]

Plaintiffs' counsel did not make any golden rule arguments, but even if they had, the use of such arguments "is not improper [in Utah] when urged on the issue of ultimate liability.[135]

Plaintiffs' counsel also did not argue or suggest that the jury serves as the conscience of the community in rendering a verdict. Counsel never uttered the word "conscience," and the only

---

[132] Order re Mots. In Limine Addressed at Feb. 6, 2015 Pretrial Conference at 2-13.

[133] *See supra* I(A)(1) & (2).

[134] Tr. of Closing Arguments, Mar. 2, 2015, p.m., at 6:14-17, 7:1-8:2, 23-24.; *See also id.* at 13:25-14:2 ("The law simply says determine what a standard of care is, what they are supposed to do, and then look to see if it happened."); 19:6-8 ("Remember I said you can't substitute your standard of care. You have to go by what the doctor says is the standard of care.").

[135] *Green v. Louder*, 2001 UT 62, ¶ 36, 29 P.3d 638 (quoting with approval *Shultz v. Rice*, 809 F.2d 644, 651-52 (10th Cir. 1986)).

"community" he referred to was "the medical community," not the community in which the jurors live.[136] What counsel suggested was that the standard of care is not case specific but applies in all similar cases. That is a far cry from asking the jury to ignore the Court's instructions and act as the "conscience of the community."[137]

Nor did plaintiffs' counsel ask the jury to "send a message" to medical providers by its verdict. Plaintiffs' counsel only asked the jury to do justice.[138]

Plaintiffs' counsel did not appeal to or inflame the passions or prejudices of the jury. He specifically reminded the jury of the Court's instruction that it could not decide the case based on sympathy: "Please don't let sympathy come into your deliberation at all. That would be like slapping [Mr. Scott] upside the head. He doesn't want your sympathy, but he does want your justice. He wants that bad because he deserves it."[139]

Finally, plaintiffs' counsel did not violate any Utah appellate court decisions relating to closing arguments. They did not ask the jury to protect a particularly vulnerable party,[140] to "send

---

[136] *See* Tr. of Closing Arguments, Mar. 2, 2015, p.m., at 36:18-20.

[137] Plaintiffs' counsel did not violate the Court's order in limine, but in fact jurors do act as the conscience of the community. As plaintiffs showed in exhibit 1 to their memorandum in opposition to the defendant's "Reptile" motion, nearly half the states expressly inform jurors when they are called that their role is to act as the conscience of the community and express community values and standards. *See also, e.g., Witherspoon v. Ill.*, 391 U.S. 510, 519 (1968) (recognizing the jury's role as the conscience of the community); *U.S. v. Solivan*, 937 F.2d 1146, 1151 (6th Cir. 1991) ("Unless calculated to incite the passions and prejudices of the jurors, appeals to the jury to act as the community conscience are not per se impermissible.") (citation omitted); *U.S. v. Kopituk*, 690 F.2d 1289, 1342-43 (11th Cir. 1982) (accord); *U.S. v. Lewis*, 547 F.2d 1030, 1036 (8th Cir. 1976) (accord); *State v. Pierren*, 583 P.2d 69, 71 (Utah 1973) (it was not error in a prosecution for distributing pornographic material to instruct jurors that they are the exclusive judges for expressing "the common conscience of the community").

[138] *See, e.g.*, Tr. of Closing Arguments, Mar. 2, 2015, p.m., at 32:4-6; 89:22-90:1.

[139] *Id.* at 31:25-32:6.

[140] *Cf. State v. Akok*, 2015 UT App 89, ¶ 16, 348 P.3d 377; *State v. Wright*, 2013 UT App 142, ¶ 41, 304 P.3d 887.

a message,"[141] to punish the defendant, or otherwise to decide the case on anything other than the law and facts and the standard of care established by expert testimony in the case.

5. Any alleged error was harmless.

Even if there were some error in plaintiffs' closing – and there was not – any alleged error was harmless.

Trial errors may only give rise to a new trial if they affect the substantive rights of the parties and are not cured by the court's curative instructions.[142] Even a statement by counsel violating a court's in-limine order does not necessarily require a new trial, particularly where court gave a curative instruction.[143]

The Court here instructed the jury as follows:

> Your duty is to decide this case and this case alone. You should not use this case [] as a forum for correcting any perceived wrongs in other cases or in the broader society or as a means of expressing views about anything other than the right verdict in this case.
>
> Your verdict should reflect the law that's been given to you in these instructions, appl[ied] to the facts you find supported by the evidence. Your decision should not be distorted by any outside factors and objectives.
>
> You are making an important contribution to justice and fairness in your community if you focus exclusively on this case and return a just and proper verdict.[144]

---

[141] *Cf. State v. Thompson*, 2014 UT App 14, ¶ 68, 318 P.3d 1221.

[142] See UTAH R. CIV. P. 61 (no trial error is ground for granting a new trial or otherwise disturbing a judgment unless refusal to take such action is inconsistent with substantial justice; the court must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties).

[143] *Child v. Gonda*, 972 P.2d 425, 430 (Utah 1998).

[144] Tr. of Closing Arguments, Mar. 2, 2015, p.m., at 92:15-93:4.

Even if there were some hypothetical error in counsel's statements, the Court's instruction cured the error.[145] Jurors are presumed to follow the instructions of the court.[146] The fact that the jury found for the plaintiffs and awarded them a substantial verdict in a catastrophic injury case is not evidence that the jury failed to follow the Court's instructions in the case. The defendant's own expert Dr. Sloan agreed that Dr. Jensen failed to follow the standard of care, the defendant agreed in their own life care plan that the plaintiffs' economic damages were no less than $4 million, and the evidence showed that the Scotts are going to have to live with Mr. Scott's serious disabilities for another 20 years or more.[147] A large verdict in a case such as this is acknowledgment of the severity of the injury and is not evidence that the verdict was inflamed by passion and prejudice as defendant hospital claims.

B. <u>Counsel did not improperly imply that Dr. Jensen was "at fault" for being absent for part of the trial.</u>

Defendant hospital claims that plaintiffs' counsel inflamed the passion and prejudice of the jury when he "insinuated that Dr. Jensen was at fault for being absent for portions of the trial."[148] "Fault" in the context of this case had a very specific meaning. The Court defined "fault" for the jury, and it did not include being absent from trial.[149] Plaintiffs' counsel did not "insinuate" that Dr. Jensen was "at fault" for missing portions of the trial. Rather, he asked Dr. Jensen if he had

---

[145] *See Child*, 972 P.2d at 430; *State v. Harmon*, 956 P.2d 262, 271-73 (Utah 1998) ("curative instructions are a settled and necessary feature of our judicial process and one of the most important tools by which a court may remedy errors at trial"; "virtually every jurisdiction, both state and federal, relies upon such instructions in curing errors during trial") (citations omiteed).

[146] *See, e.g. Harmon*, 956 P.2d at 272-73 (citations omitted).

[147] *See* Tr., vol. X, Mar. 2, 2015, at 150:20-22 (Mr. Scott's life expectancy was 20.6 more years).

[148] Mot. at 15.

[149] *See* Tr., vol. X, Mar. 2, 2015, at 144:5-12.

heard that the defendant's own expert neurosurgeon, Dr. Sloan, had criticized Dr. Jensen's care of Mr. Scott in his testimony the previous day. Counsel then asked Dr. Jensen:

> Don't you think it would be valid for you to sit in this courtroom, since we are, and we're having to come every day, that you, since it's about you, and what you did, don't you think it's valid that you should be here to hear what these other doctors have to say about your care, so you might evaluate what they're going to – what they've said?[150]

Defendant's counsel asked to approach the bench, and the Court instructed Dr. Jensen not to answer the question,[151] and he did not.

The defendant hospital cites no authority that says that it is impermissible to comment on a witness's absence from portions of a trial, and the plaintiffs have found none.[152] In fact, "it is permissible to cross-examine a witness, for impeachment purposes, as to his mental state or condition."[153] Thus, it was not impermissible for counsel to try to show Dr. Jensen's apparent lack of interest in other neurosurgeons' criticisms of his work. Counsel is given "wide latitude for examination" when cross-examination goes to bias and motive.[154]

---

[150] *See* Tr., vol. VIII, Feb. 26, 2015, at 228:16-21.

[151] *See id.* at 228:22-24.

[152] *Cf. Winfield v. State*, 437 S.E.2d 849, 852 (Ga. Ct. App. 1993) (even assuming error occurred when court failed to give curative instruction or rebuke prosecutor during closing argument after defendant merely objected when prosecutor commented on the defendant's absence from a portion of the trial, any error did not result in a miscarriage of justice where it was highly probably that error did not contribute to the judgement) (citation omitted); *State v. McCon*, 645 S.W.2d 67, 70 (Mo. Ct. App. 1982) (a prosecutor's reference, in jury argument, to the absence of witnesses who purportedly could have testified favorably for defendant was not plain error which, in the absence of an objection, would require appellate relief) (citations omitted).

[153] Jonathan M. Purver, Annotation, Cross-Examination of Witness as to His Mental State or Condition, to Impeach Competency or Credibility, 44 A.L.R.3D 1203, § 2[b] (1972) (footnote omitted).

[154] *State v. Ramos*, 882 P.2d 149, 155 (Utah Ct. App. 1994) (citation omitted).

The jury was instructed that their verdict had to be supported by the evidence,[155] and that what the lawyers say is not evidence.[156] Jurors are presumed to follow the instructions.[157]

The defendant hospital claims that the question was "troubling" because it was the Scotts' oral motion in limine that prevented the Hospital from explaining what Dr. Jensen was doing during the times he was absent from trial.[158] Before the start of the trial, plaintiffs' counsel asked that, if there was any mention of Dr. Jensen's whereabouts in opening, that it be limited to saying that he would be in and out, as opposed to that he will be treating patients or in surgery or saving lives "or something like that."[159] The Court noted that defendant hospital's counsel had already addressed the issue when he had previously told the Court, in the presence of the jury venire, that Dr. Jensen would be "in and out during the course of the trial due to patient responsibilities"[160] and that "[i]t shouldn't go any further than that."[161]

After plaintiffs' counsel asked the question to which defendant hospital now objects and after defense counsel asked to approach the bench, plaintiffs' counsel offered to ask Dr. Jensen if he was taking care of patients. The Court indicated that he had opened the door and said that she would let defense counsel do that.[162] Counsel chose not to. Thus, if there was any error in simply asking the question, it was waived. The defendant hospital could have addressed any allegedly

---

[155] *See, e.g.*, Instruction Nos. 2, 11; Tr., vol. I, Feb. 17, 2015, at 184:3-11; 187:15-188:13.

[156] Instruction No. 12, Tr., vol. I, Feb. 17, 2015, at 188:16-189:4.

[157] *E.g., State v. Harmon*, 956 P.2d at 272-73 (citations omitted).

[158] Mot. at 8; *see also id.* at 16.

[159] Tr., vol. I, Feb. 17, 2015, at 175:13-20.

[160] *See id.* at 30:11-14.

[161] *Id.* at 178:22-25.

[162] *See* Tr., vol. VIII, Feb. 26, 2015, at 229:15-20.

improper insinuation at trial and simply chose not to. The question therefore provides no basis for a new trial.[163]

C. **<u>Counsel did not improperly insinuate that the Hospital had withheld or destroyed evidence.</u>**

The defendant hospital claims that plaintiffs' counsel three times insinuated that it had withheld or destroyed evidence—once in plaintiffs' examination of Dr. Jensen, which they then "exacerbated" in their cross-examination of defense expert Dr. Sloan, and again in their recross-examination of Dr. Chin.

In their openings, the attorneys for both sides talked about Dr. Jensen presenting Mr. Scott's case to the tumor board. Plaintiffs' counsel examined Dr. Jensen about his memory of presenting the case to the tumor board. In his deposition, Dr. Jensen had testified that he did not have any memory of presenting Mr. Scott's case to the tumor board *before* the surgery but that he was sure that he presented it to the tumor board *after* the surgery, at a regularly scheduled meeting.[164] He also testified that, when he takes a case to the tumor board, it is his practice to call the patient and tell him about the discussion,[165] but that he never called the Scotts about any tumor board discussion.[166] Plaintiffs' counsel asked how the jury could know what the tumor board said,

---

[163] *Cf., e.g., State v. Hodges*, 30 Utah 2d 367, 514 P.2d 1322, 1324-25 (1974) (where the trial court sustained an objection to the prosecutor's question as to whether the defendant had used the same gun to perpetrate another robbery, did not overemphasize the matter, and instructed the jury to base its verdict solely on the evidence introduced at trial, and there was no showing that the incident so prejudiced the jury that in its absence there might have been a different result, the trial court did not abuse its discretion in denying a mistrial).

[164] Tr., Feb. 19, 2015, vol. III, at 150:4-151:11. *See also* Tr., vol. VII, Feb. 25, 2015, at 305:2-16.

[165] *See* Tr., vol. III, Feb. 19, 2015, at 151:12-152:1.

[166] *See id.* at 154:19-25.

and Dr. Jensen testified that no record was kept other than a notation that Mr. Scott's case was to be presented to the tumor board.[167]

On cross-examination, the defense counsel showed Dr. Jensen the record of the tumor board meeting of March 3, the day before Mr. Scott's surgery, to refresh his recollection and examined him on it at length to show that no one suggested putting off Mr. Scott's surgery.[168]

On redirect examination, plaintiffs' counsel wanted to test Dr. Jensen's memory of the second, post-surgery meeting by comparing it to his testimony of the first meeting. He said, "[Y]ou say to the jury there was both [a pre-operative tumor board meeting and a post-operative tumor board meeting about Mr. Scott], and you bring this record, and all this record shows is that – the name of it to be presented on a day, right?"[169] He then asked Dr. Jensen, "Show me the record of when it was the second time, and you presented it, and the doctors discussed what happened."[170] The following exchange took place:

> A I'm not sure. I mean, that's what you have. I-
>
> Q Yeah, that's my point. Is we asked for – because you said, oh no, I also came back, and we had this conversation and everything, and we asked for all those records. And what we received was what you've just shown, and said, this shows the first one.
>
> A Okay.
>
> Q Where's the record of the second one where people would have been talking about, how did this happen? What happened? You

---

[167] *See id.* at 153:18-154:1.

[168] *See id.* at 184:23-188:21.

[169] *Id.* at 190:18-21.

[170] *Id.* at 190:23-25.

said it there [i.e., in his deposition]. Where's my record to show us that it – you actually did take it to them, please?

A I – you know it's – once again, I didn't remember – I don't remember that specifically, so –

Q Where is the record – you said to them that you did it afterwards too. Then you said, I presented, and they were, okay, and – where is the record that you actually did go and present to these people after the fact what you had found, and what was going on with your patient? Where is it, sir?

A Oh, I don't know. I don't know where the record is.

Q There isn't a record, is there, sir?

A I – I'm not – that isn't something I looked for, and I don't know where – I don't know that. I'm not responsible for keeping that record so I wouldn't know where it is.

MR. WOREL: I think that's all the questions I have.[171]

Defense counsel chose not to ask any follow-up questions.[172]

The plaintiffs were entitled to point out the absence of evidence to support Dr. Jensen's claim that he discussed Mr. Scott's case post-surgery with the tumor board.[173] Plaintiffs' counsel was not "insinuat[ing]" that the defendant hospital had destroyed or withheld records; he was questioning whether the meeting had ever occurred because there was no record of it and questioning why Dr. Jensen's memory of a meeting for which no record existed would be better than his memory of a documented meeting (the pre-operative tumor board meeting).

---

[171] *Id.* at 191:1-192:2.

[172] *See id.* at 192:3.

[173] *See, e.g., State v. Carter*, 776 P.2d 886, 891 (Utah 1989) (counsel may refer to the lack of any evidence to support the other side's theory of the case), overruled on other grounds as stated in *Archuleta v. Galetka*, 2011 UT 73, ¶ 29, 267 P.3d 232; *State v. Larsen*, 2005 UT App 201, ¶ 13, 113 P.3d 998 (a party may validly present inferences the jury may draw from the absence of evidence at trial); *State v. Tilt*, 2004 UT App 395, ¶ 18, 101 P.3d 838 (counsel may argue "'the paucity or absence of evidence adduced by the defense'") (citation omitted).

Plaintiffs' counsel did not "exacerbate[]" the alleged problem by "repeating the insinuation during the cross-examination of Dr. Sloan," the defense expert, as the defendant claims.[174] In examining Dr. Sloan, counsel said, "Dr. Jensen has said something about, there was a post surgical tumor board meeting. Do you see any records about any post surgical tumor board meeting?," to which Dr. Sloan testified, "I did."[175] Plaintiffs' counsel was surprised because he had been told that no records of a post-surgical tumor board meeting existed, so he asked follow-up questions in which he suggested that what Dr. Sloan had seen were the records of the *pre*-surgical tumor board meeting. When Dr. Sloan asked counsel, "[W]hy don't you show that to me?" counsel responded: "Dr. Jensen has testified, and I asked him, because we asked that the hospital - . . . for any record of a post surgical record. . . And there isn't." Dr. Sloan responded, "Okay. Well, I saw a tumor board, and if the date was wrong, I didn't catch that."[176] Counsel was not insinuating that the defendant had destroyed any record. Far from "exacerbating" the problem, plaintiffs' counsel was merely trying to clarify for the jury whether what Dr. Sloan had seen was a record of the pre-operative tumor board meeting or the postoperative tumor board meeting.

The defendant says the fact that plaintiffs' counsel requested a spoliation instruction confirms that it was their intent to suggest to the jury that the hospital had destroyed the record.[177] Plaintiffs' counsel requested a spoliation instruction because there was testimony of a pre-operative tumor board meeting, for which a record exists, and of a postoperative tumor board meeting, for which no record exists or at least for which no record was produced. If Mr. Scott's

---

[174] *See* Mot. at 8.

[175] Tr., vol. VII, Feb. 25, 2015, at 170:13-16.

[176] *Id.* at 170:17-171:11.

[177] Mot. at 9.

case was presented at a regularly scheduled meeting of the tumor board, as Dr. Jensen remembered, and if Dr. Sloan had seen a record of the meeting, as he seemed to recall (albeit he may have been thinking of the pre-operative meeting), then a record of the second meeting should have existed, and a reasonable inference is that the record was lost or destroyed. In any event, the Court did not give a spoliation instruction to the jury, and the plaintiffs did not argue spoliation in their closing argument. No error can be predicated on an instruction the Court did not give, an argument plaintiffs did not make, and an issue that never went to the jury.

The third instance where the defendant hospital claims that Scotts' counsel insinuated that it had withheld evidence was in the re-cross-examination of Dr. Chin, the hospital pathologist. Dr. Chin had testified that he had no memory of the events of March 4, 2010, the day of his pathology report and the day of the surgery, and that the parties would have to rely on the medical record.[178] p Dr. Chin testified about the frozen slides he looked at during the surgery. Then he testified that, in preparation for his deposition and this trial testimony, he re-examined scanned images of the original slides and some re-cuts, but the original slides remained at the University of Utah.[179] He testified that on the re-cuts he was able to see a piece of artery in the third specimen but not in any of the others.[180] On cross-examination, plaintiffs' counsel asked Dr. Chin if he remembered seeing the artery on March 3,[181] and he said no, he remembered seeing it on the day he signed out the case, March 9.[182]

---

[178] *See* Tr., vol. VI, Feb. 24, 2015, at 139:12-14; 139:20-24.

[179] *Id.* at 170:6-16.

[180] *Id.* at 170:24-171:1; 173:7-10.

[181] Although counsel said March 3, he meant the day of the surgery (March 4) which is when Dr. Chin would have first looked at the tissue samples.

[182] *See* Tr., vol. VI, Feb. 24, 2015, at 177:5-178:17.

On redirect, Mr. Rooney, defendant hospital's counsel, asked Dr. Chin if he had reviewed the slides, or the cuts of the slides, and images of the slides before his deposition and before coming out to testify and if he felt comfortable that he had an image in his mind of the size of the vessel, and Dr. Chin said, "Yes,"[183] On re-cross-examination, Dr. Chin conceded that all he remembered about the case before reviewing the slides before his deposition was seeing a blood vessel associated with a biopsy case but that now he had a more vivid picture of what the vessel looked like microscopically.[184] To which Mr. Worel responded, "I don't have those slides. Where'd you get those slides to be looking at, sir?" Mr. Rooney interrupted and said, "You Honor, they were given the slides, that's not—" So Mr. Worel repeated his question: "Where'd you get the slides?"[185] Dr Chin explained, "I have not reviewed the original slides as we discussed at the deposition. *I reviewed the scanned images of the original slides. . .* as well as the recuts," and "*the scanned images are accurate representations of the original slides*."[186]

The defendant claims that it provided the re-cuts to the Scotts' counsel. But Dr. Chin was not testifying only as to the re-cuts but also as to scanned images of the original slides, which were not provided to the plaintiffs. Defendant's counsel made it clear originals don't get sent around.[187]

The defendant said that it was going to ask for an instruction to the jury that there is "absolutely no evidence of any destruction of records."[188] It also asked the Court to instruct the

---

[183] *Id.* at 202:1-12.

[184] *Id.* at 202:20-203:2.

[185] *Id.* at 203:3-7.

[186] *Id.* at 203:9-18 (emphasis added).

[187] Tr., vol. VIII, Feb. 26, 2015, at 6:4.

[188] *See id.* at 2:16-20.

jury before their expert pathologist, Dr. Bollen, testified, that there was no evidence that the defendant did not provide slides to counsel, and, in fact, the evidence is that they did, and the jury should disregard any inference or suggestion otherwise.[189]

Mr. Worel did not suggest that the defendant hospital had destroyed or lost evidence, nor did he deny that it had provided plaintiffs with re-cuts of the slides. He explained to the Court that what he was talking about was that Dr. Chin had said there were re-cuts of the slides, and Mr. Worel had not seen any re-cuts that Dr. Chin said he had done. He understood Dr. Chin to say that "they had taken and sliced it again and looked at it," and that's what Mr. Worel was talking about.[190] The Court said that its memory was that it was ambiguous as to what they were referring to, so "perhaps there should be an instruction indicating that the original copies were sent, that there is – that plaintiffs did not receive the re-cuts."[191] Plaintiffs' counsel was fine with the Court instructing the jury as it suggested.[192]

The Court ultimately proposed to instruct the jury that "the original pathology slides are never released once they're cut. However, the parties have been given . . . re-cuts, and everybody's been given a separate re-cut to observe."[193] Counsel for both sides agreed to the Court's instruction.[194] The instruction cleared up any ambiguity in Dr. Chin's testimony and refuted any

---

[189] *Id.* at 3:23-4:2.

[190] *Id.* at 4:9-14. See also *id.* at 5:12-20.

[191] *Id.* at 4:22-5:1. See also *id.* at 10:23-11:4.

[192] *Id.* at 6:1-2.

[193] *Id.* at 8:6-10.

[194] *See id.* at 8:11-9:1.

unintended implication that the defendant had withheld evidence from the plaintiffs. So even if plaintiffs' counsel's questions to Dr. Chin were somehow improper, any error was harmless.

D. Counsel did not improperly insinuate that plaintiff Debra Scott was "merely" a loving wife who did not want to get paid.

The defendant hospital claims that plaintiffs' counsel "inflame[d]" the passion and prejudices of the jury by twice suggesting in closing argument the Mrs. Scott was merely a loving wife and hero who did not want to "get paid," even though she had a claim for loss of consortium. Plaintiffs' counsel did no such thing. He just told the truth, and there is nothing improper or inflammatory about telling the truth.

As a preliminary matter, defendant hospital did not object to either statement by counsel; therefore, it has waived any objection to them.[195]

The first statement the defendant complains of was when counsel told the jury that Mrs. Scott "doesn't want to get paid for the fact that she's having to help her husband." That was true. The context of the statement the defendant complains of was that counsel was distinguishing between "cold, hard economic damages," such as the cost of care, and noneconomic damages, such as loss of consortium damages. He explained that he was more concerned about economic damages but that he couldn't help them with calculating noneconomic damages.[196] He then said:

> I'm going to tell you something right here Debra has asked me to tell you she doesn't want it. She took her husband on for better for worse, for richer for poorer, until death do they part.
>
> And *she doesn't want to get paid for the fact that she's having to help her husband*. She doesn't want it, and she's authorized me –

---

[195] *Heslop v. Bank of Utah*, 839 P.2d 828, 839 (Utah 1992) ("Absent an objection by [a] defendant, we will presume waiver of all arguments regarding the appropriateness of counsel's statements unless the error falls into the category of plain error." The Hospital does not claim plain error.

[196] *See* Tr. of Closing Arguments, Mar. 2, 2014, p.m., at 35:1-21.

> actually told me, not authorized me – told me to tell you, “Take care of my husband. I don’t need to be paid for it.”
>
> This thing here, *care gratuitously rendered*, that they said that’s the cost of what she’s given her husband. She doesn’t want it. She gave it to her husband because she loves him. She doesn’t want to be paid for it, but she does ask you “Take care of my husband.”[197]

There was no objection to this statement, so any claim of error has been waived.[198]

In any event, there was no error. Plaintiffs’ counsel was clearly talking about compensation for the care Mrs. Scott has gratuitously rendered to her husband (and will continue to render). Plaintiffs were legally entitled to recover for such care.[199] The plaintiff did not ask to recover economic damages for care gratuitously rendered; the Court did not instruct on that item of damage;[200] and the jury was not asked to award damages for care gratuitously rendered.[201] Thus, counsel’s argument was accurate.

---

[197] *Id.* at 36:1-17. (emphasis added).

[198] *See Hern*, *Diesel*, and *Heslop* supra.

[199] *See, e.g., Hill v. U.S.*, 81 F.3d 118, 119-20 (10th Cir. 1996); *Adams v. Erickson*, 394 F.2d 171, 172, (10th Cir. 1968) (awarding the plaintiff the reasonable value of his spouse’s gratuitous nursing services); *Jackson v. U.S.*, 526 F. Supp 1149, 1154 (E.D. Ark. 1981) (“plaintiff is entitled to a substantial award for caretaking expense, even though these serves are now provided by his wife who undoubtedly took a marriage vow to care for him in sickness and in health. . . In assessing the value of these services over and beyond the services a wife ordinarily provides for her husband, we are entitled to draw upon our experience in the affairs of life.”); aff’d, 696 F.2d 999 (8th Cir. 1982); *City of Tucson v. Holliday*, 411 P.2d 183, 194 (Ariz. Ct. App. 1966) (“We approve the view allowing recovery for the reasonable value of nursing care or services rendered gratuitously to a plaintiff by a friend or relative.”); *Beckert v. Doble*, 134 A. 154, 155 (Conn. 1926) (a husband “is entitled to reimbursement for his own time and services devoted to the care of his wife, to the extent of the reasonable worth of his services so rendered”); *Biddle v. Griffin*, 277 A.2d 691, 691 (Del. 1970) (“many courts have permitted a husband . . . to recover the reasonable value of the nursing care he has rendered his wife.”); *Bandel v. Friedrich*, 584 A.2d 800, 802 (N.J. 1991) (“The majority of jurisdictions that have considered [whether an injured party can recover for gratuitous services rendered by family members] recognize that a plaintiff may recover the value of those services.”) (citations omitted); 22 AM. JUR. 2D Damages § 209. Cf. RESTATMENT (SECOND) OF TORTS § 920A(2) & cmt. C(3) (a tortfeasor gets no credit against his liability for services gratuitously rendered to the plaintiff).

[200] *See* Tr., vol. X, Mar. 2, 2015, at 146:15-151:15.

[201] *See* Special Verdict Form at 3 (asking the jury the amount that fairly compensates Mrs. Scott for loss of consortium, not for care gratuitously rendered).

Noneconomic damages recoverable for loss of consortium are different from economic damages for care gratuitously rendered. They are meant to compensate the spouse of a seriously injured person for the loss of the benefits that spouse would otherwise expect to receive from the martial relationship, such as loss of companionship, cooperation, affection, aid, and sexual relations.[202] The plaintiffs were within their rights to ask for noneconomic damages for loss of consortium but not for economic damages for care gratuitously rendered, and it was not error to tell the jury so.

The second statement the defendant complains of was counsel's characterization of Mrs. Scott as a loving wife and hero. This is what counsel said:

> The final thing is if there was an award for spouse, caregiver, driver, confidante, supporter, advocate, Debra Scott would have won that award unanimously for the last five years.
>
> Now, as [Mr. Worel] said, she said, "You know, when I married him I love him and accept that," but it's not justice when somebody else causes this level of damage. That is not justice. That's not something that someone has to accept.
>
> Who has to accept it – just under the law and under the way we operate, who has to accept it is the person and institution that caused that damage. That's who has to accept it, and the fact is as David [Scott] gets older, he's going [to] have more care needs. As Debra gets older, as tough as she is – she should have an "S" on her chest – she's going to need more help.
>
> And you are, as [Mr. Worel] said, uniquely qualified in the world. This jury right here is uniquely qualified in the world to provide that care. Nobody else there's no one else in the world that can do this other than you.[203]

---

[202] *See* Model Utah Jury Instructions 2d (MUJI 2d) CV2012 ("Noneconomic damages, loss of consortium.").

[203] Tr. of Closing Arguments, Mar. 2, 2015, p.m., at 88:25-89:21.

Again, there was no objection, so any error was waived.[204]

But, again, there was no error. Plaintiffs' counsel was merely telling the jury that it needed to award damages sufficient to provide for Mr. Scott's future care needs because, as strong as she was, Mrs. Scott would not always be able to provide the care (for which she has sought no compensation) herself. Of course, the plaintiffs were entitled to recover for the future cost of Mr. Scott's care.[205]

Defendant hospital has not said what was wrong with this argument,[206] and in fact such references are permissible.[207] The jury heard Mrs. Scott's testimony about what she has done and continues to do for her husband. Counsel's characterization of her was a reasonable inference from the evidence. Even the government recognizes family caregivers, such as Mrs. Scott, as the "heroes on the frontlines of long-term care" and "the backbone of our nation's long-term care system."[208] Counsel's references to Mrs. Scott were not improper, much less do they provide any grounds for a new trial, even if the arguments had not been waived.

---

[204] *See Hern*, *Diesel*, and *Heslop* supra.

[205] *See, e.g.*, MUJI 2d CV2005 ("Economic damages [that a jury should award] include reasonable and necessary expenses for medical care and other related expenses incurred in the past and those that will probably be incurred in the future.").

[206] *Cf. State v. Diaz*, 2002 UT App 288 ¶ 53, 55 P.3d 1131 (while portions of closing argument may have been dramatic, they were simply meant to impress on the jury the importance of their duty), cert. denied, 63 P.3d 104 (Utah 2003).

[207] *Cf., e.g., Browning v. State*, 2006 OK CR 8, ¶ 43, 134 P.3d 816 (a prosecutor who, during closing argument in the guilt phase of a capital murder prosecution, called the state's key witness a courageous hero did not commit error; the statement was a reasonable inference from the evidence); *Collins v. State*, 2015 WY 92, ¶ 38, 354 P.3d 55 (a prosecutor's reference to a child witness as a "hero" did not violate a clear and unequivocal rule of law; it was not vouching for the witness's credibility but was a reasonable inference about the witness who appeared and testified at trial).

[208] *See* Office of the Assistant Sec'y for Planning & Evaluation, U.S. Dep't of Health & Human Servs,. Family Caregivers: Our Heroes on the Frontlines of Long-Term Care (Dec. 16, 2003), https://aspe.hhs.gov/family-caregivers-our-heroes-frontlines-long-term-care.

E. If Counsel may have misheard a statement by defense counsel, he candidly acknowledged he may have misheard, and no curative instruction or any other corrective action or mistrial was ever requested by defense counsel.

Defendant hospital complains about plaintiffs' counsel stating that Mr. Rooney told the jury Mr. Scott would be "better off dead." However, defendant did not provide the context of the statement, nor did it point out there was an objection but no request for ruling, no request for curative instruction, or admonishment, or request for jury instruction, or motion to strike or motion for new trial by defense counsel. What transpired was as follows. In his closing argument, defense counsel, Mr. Rooney stated:

> So their [plaintiffs'] claim all along has been, 'oh, you should have ruled out infection.'. . . So what would have happened is they run all these tests, as Dr. Horowitz says, send him to a dentist and had his ears checked, as he would have ended up back in Dr. Jensen's office with a big lesion in his brain with no explanation for it which would have made it even more likely to think it was tumor [sic].
>
> He would have come back and he would have had this, and all these tests would have been negative, and they wouldn't give any explanation. You know, it is a sort of the elephant in the room, but I can't imagine it would have been a better result if Mr. Scott did have cancer. Clearly that wouldn't have been a good thing.[209]

In his rebuttal argument, plaintiffs' counsel, Mr. Thronson, stated in response:

> I have to say that I am flabbergasted by what you've just heard from defense counsel. I may have written this down wrong, but I heard him say that perhaps it would have been better if Mr. Scott did have -- better result if Mr. Scott did have cancer. Honestly? That Mr. Scott would have been better off dead is what he is saying. . .[210]

Mr. Rooney objected. The Court asked counsel to approach and the following partly unintelligible exchange took place:

---

[209] Tr. of Closing Arguments, Mar. 2, 2015, p.m. at 75:25-76:17.

[210] *Id.* at 78:4-20.

> Mr. Rooney: (Unintelligible) better for cancer (unintelligible) exact opposite (unintelligible) never said better if he had it. (Unintelligible).
>
> Mr. Thronson: That's what I heard. (Unintelligible) jury doesn't think that's what he said. They can disregard what I said. I'm going to move on.
>
> The Court: All right. I don't recall if that's what he said, but I don't remember the exact words, and I didn't write it down, Counsel, but let's move on.[211]

Plaintiffs' counsel Mr. Thronson may have misunderstood defense counsel in using the word "can" instead of "can't" in talking about what a "better result" would have been. Plaintiffs' counsel candidly told the jury he may have written defense counsel's statement down wrong. The Court didn't recall the exact words used. Defense counsel's objection is at least partly unintelligible. However, it is clear that there was no request from defense counsel to have the Court strike that statement, or issue a curative instruction, or admonish counsel, or tell the jury to disregard the comment. Defense counsel did not request any of these actions, or move for a mistrial, or a jury instruction or any other corrective action. Whatever was said at the bench conference, the isolated statement clearly was not significant enough for defense counsel to request any corrective action whatsoever. In addition, the jury instructions were clear that the jury was to base its decision solely on the facts of the case, not on statements of counsel.[212] Defense counsel evidently felt that the matter was *de minimus*, and that there was no prejudice to defendant. Otherwise he would have

---

[211] *Id.* at 79:2-12.

[212] *See* Instruction No. 12, Tr., vol. I, Feb. 17, 2015, at 188:16-189:4.

requested some corrective action. By not doing so defendant hospital has waived any objection at this time.[213]

F. **Counsel did not improperly express personal beliefs about Dr. Jensen's trustworthiness.**

Defendant also criticizes plaintiffs' counsel Mr. Thronson for telling the jury that at his deposition Dr. Jensen seemed to be a pretty honest person. Defendant hospital is criticizing the statement because it allegedly brings before the jury opinions about information to which the jury was not privy, *i.e.*, that in his deposition Dr. Jensen seemed honest. Defendant's objection is likely a first in the annals of objections seeking a new trial. What plaintiffs' counsel in fact did was observe defense witness Dr. Jensen's apparent honesty in the deposition which he took of Dr. Jensen.

The following is the testimony regarding this issue:

> And so Dr. Jensen – [Defense expert] Dr. Sloan agrees with Dr. Horowitz. He agrees with Dr. Bloomfield. This is also the first case I've had where a physician whose care has been called into question has run so far from his own medical records and his own sworn deposition testimony.
>
> And I will tell you something -- I was the one that took Dr. Jensen's deposition, and I remember coming back and talking to Mike, and I said 'this guy seems pretty honest. I mean he admitted he made a mistake. He admitted that the Scotts could have watched and waited. He admitted that [they] could have waited for a month or two. He admitted that he doesn't know why he would have said to them you can't wait.'
>
> I said, 'you know, he's a pretty honest guy. And so, you know, you need to -- when they put him on the stand you need to -- you know, the jury will probably like him because he's been so honest.'

---

[213] *See Hern*, *Diesel*, and *Heslop* supra.

> I don't even recognize the person that took the stand that you heard when you put him on last Tuesday or Wednesday. That's 180 degrees from the individual I deposed. He couldn't answer a simple question like 'what does "needless" mean? Or, 'what does "resolved" mean?'
>
> He fought with Mr. Worel about 'Well, you know, you can wait but you can't really wait in a case like this,' and Mike had to get up and say you said right here in this case you can wait. You don't have to go in. It's not . . . 'well, I'm not sure' -- I mean it was painful to watch this, and frankly was disappointing because I had taken his deposition and he had sworn to tell the truth.
>
> Dr. Jensen said himself it would have been perfectly reasonable to wait and see what happens with this abnormality that everybody sees, instead he raced to cut Mr. Scott's head open. You saw the video where they used a saw to cut his head open.
>
> As between a safe option of which also Dr. Sloan said and Dr. Horowitz said and Dr. Bloomfield said a safe option of watching and waiting, not doing nothing -- testing, doing MRIs, these kinds of things, he chose to recommend -- he discouraged that and chose to recommend cutting his head open. Who in their right mind when faced with these two options would say, 'you know what, I want you to cut my head open. I've always wondered what my brain looked like inside. I want you to take a picture of this, and, you know, I'm not going to watch and wait and do this other test. I want you to cut my head open.' Nobody. There's not a person in the world who is sane that would agree to that.[214]

All of the decisions in this area involve counsel references that the witness in some other venue had been untruthful. Here, just the opposite occurred. Dr. Jensen <u>was complemented about his honesty</u> during his deposition. All of the key deposition statements which Dr. Jensen had honestly made were referenced verbatim at the trial in front of the jury. Dr. Jensen was given every opportunity to reconfirm the veracity of those deposition statements in front of the jury. His refusal

[214] Tr. Closing Arguments, Mar. 2, 2015, p.m., at 80:13-82:15.

to do so reflected upon his lack of candor at the trial, not at his deposition. It was completely proper for plaintiffs' counsel to point this out to the jury.

In addition, defense counsel made no objection to those statements at the time of trial or at any time thereafter until over a year later in the instant motion. They did not object at the time, claim prejudice, they did not ask for a clarifying or curative instruction, admonishment, jury instruction or any other instruction from the Court, nor did they seek a mistrial. Therefore, any claim of error has been waived.[215] In addition, in the Jury Instructions the jury was commanded that they were only to consider the facts of the case, and that statements by counsel were not evidence.[216]

In summary, at the trial the jury heard large portions of Dr. Jensen's sworn deposition testimony where he admitted fault in a number of areas (i.e. discouraging "watchful waiting," proceeding when he was told there was no cancer evident, causing the stroke through "surgical manipulation," etc.) All of the important deposition concessions that Dr. Jensen made were repeated in their entirety in front of the jury, who then made their own determination about the level of trustworthiness which Dr. Jensen should be afforded given his directly contrary trial testimony.

It is black letter law that trial counsel are given "considerable latitude in making arguments to the jury."[217] An attorney "has the right to draw inferences and use the information brought out at trial in his closing argument."[218] The jury was specifically instructed to consider the believability

---

[215] *See Hern*, *Diesel*, and *Heslop* supra.

[216] *See* Instruction No. 12, Tr., vol. I, Feb. 17, 2015, at 188:16-189:4.

[217] *State v. Young*, 853 P.2d 327, 349 (Utah 1993).

[218] *State v. Lafferty*, 2001 UT 19, ¶ 86, 20 P.3d 342 (citations omitted).

of the witnesses, including but not limited to demeanor, consistency, memory, and reasonableness.[219] The jury could clearly see for themselves that Dr. Jensen was to a large extent not capable of telling the truth on key issues as he testified before them at the trial of this case. Further, his repeated inconsistent and unreasonable testimony, along with his unreliable memory, made his testimony in large part unbelievable. The only thing plaintiffs' counsel said to the jury was that Dr. Jensen seemed very honest at the time he was deposed. That could hardly be an inflammatory comment sufficient to warrant a new trial.[220]

CONCLUSION

The litigation that concluded on March 2, 2015 was the culmination of four years of intensive litigation and 10 days of trial. Throughout that process, both sides conducted themselves with professionalism and restraint despite the highly-charged and contested nature of a case like this. The jury's verdict at the end of the case could not have been unexpected by the defendant given the facts adduced and the catastrophic nature of the damages. The jury's verdict was reasonable and based upon hard facts and lay and expert testimony, and not in any respect on the jury being "inflamed" as a result of alleged attorney "misconduct." There was no such misconduct. If any mistakes were made, they were *de minimis* in nature, and either not objected to or no corrective action or instruction was requested by defense counsel. It is far too late to do so now.

Therefore, pursuant to the transcripts of what actually occurred, and pursuant to the applicable rules, case law and treatises, plaintiffs respectfully request that defendant hospital's motion for a new trial be denied.

---

[219] *See* Instruction No. 14, Tr., vol. I, Feb. 17, 2015, at 189:15-190:13.

[220] *See supra* notes [3-7] and authorities cited therein; *see also* Instruction Nos. 15-17, Tr., vol. I, Feb. 17, 2015, at 190:14-191:7.

DATED this 6th day of June, 2016.

/s/ Charles H. Thronson
CHARLES H. THRONSON
PARSONS BEHLE & LATIMER

MICHAEL A. WOREL
DEWSNUP KING & OLSEN

Attorneys for Plaintiffs

CERTIFICATE OF FILING

I hereby certify that on this 6th day of June, 2016, I electronically filed the foregoing **PLAINTIFFS' RESPONSIVE MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR NEW TRIAL** with the Clerk of the Court using the CM/ECF systems that will send an electronic notification to counsel of record for all of the parties, including:

Terry Rooney
tr@scmlaw.com
Brad Blackham
brb@scmlaw.com
SNOW CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Fl.
PO Box 45000
Salt Lake City, Utah 84145

Michael D. Zimmerman
mzimmerman@zjbappeals.com
Troy L. Booher
tbooher@zjbappeals.com
Beth E. Kennedy
bkennedy@zjbappeals.com
Zimmerman Jones Booher LLC
136 South Main Street, Suite 721
Salt Lake City, UT 84101

/s/Charles H. Thronson
CHARLES H. THRONSON