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Herrett v. St. Luke's Magic Valley Regional Medical Center, Ltd. Appellant's Brief Dckt. 44567

IN THE SUPREME COURT FOR THE STATE OF IDAHO

RODNEY HERRETT and JOYCE HERRETT, Plaintiffs/Respondents, v. ST. LUKE'S MAGIC VALLEY REGIONAL MEDICAL CENTER, LTD., d/b/a ST. LUKE'S MAGIC VALLEY, Defendant/Appellant.	Supreme Court Docket No. 44567 Twin Falls County Case No. CV 2015-573 **APPELLANT'S BRIEF**

APPELLANTS' BRIEF

Appeal of *Rodney Herrett and Joyce Herrett v. St. Luke's Magic Valley Regional Medical Center, Ltd. d/b/a St. Luke's Magic Valley*
Honorable Randy J. Stoker, District Judge Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case

Defendant, St. Luke's Magic Valley Regional Medical Center (St. Luke's) appeals from a jury verdict in a medical malpractice case. St. Luke's admitted that a nurse breached the standard of care in caring for the plaintiff, Joyce Herrett, resulting in a stroke. The dispute centers around the extent of damage caused by the stroke, and whether the nurse's conduct was reckless. St. Luke's filed a motion for mistrial because the trial court allowed a medical expert opinion from a Dr. Wiggins that had not been properly disclosed prior to trial, violating Idaho's discovery rules and the court's pretrial order. In ruling on the mistrial, the trial court found that Dr. Wiggins had not been properly disclosed and her opinions were not provided during pretrial, discovery, the rules and the court's order had been violated, and St. Luke's was prejudiced, but refused to grant the mistrial and allowed the case to proceed. The trial court also: (1) allowed undisclosed opinions from another expert, (2) did not use the pattern jury instruction defining recklessness, thus allowing the jury to find recklessness based on an incorrect standard, and (3) did not require adequate medical foundation for a life care planner who calculated future medical care damages. These grave errors necessitate a new trial.

B. Course of Proceedings

On February 9, 2015, Rodney and Joyce Herrett filed a complaint against St. Luke's. R. p. 16. The complaint alleged four counts: (1) Negligence/Gross Negligence/Reckless Conduct; (2) Corporate Negligence; (3) Lack of Informed Consent; and (4) Attorney's Fees. R. pp. 16-22. On May 21, 2015, St. Luke's answered, R. pp. 23-29, denying the allegations, and asserting that the damages Mrs. Herrett suffered were either the result of her pre-existing medical conditions, or were not proximately caused by the nurse's actions. St. Luke's denied that the claims for corporate negligence or lack of informed consent could be asserted. The Herretts later dropped

those two claims. R. pp. 52-53 and pp. 380-381(informed consent); Tr. p. 149, Ll. 18-25 (corporate negligence). St. Luke's admitted that their employee, Nurse Wentz, breached the standard of care. The case proceeded to determine (1) the proper amount of damages, and (2) whether the conduct was reckless. The parties filed numerous motions *in limine*, and the court entered an order addressing the evidentiary issues. R., pp. 1014-1020. During trial, after the denial of St. Luke's motion for mistrial and a motion for directed verdict, R. pp. 1073-1083 and 1141-1149, the case was submitted to the jury, and the jury found in favor of the Herretts. R. pp. 1160-1169. The jury found that Nurse Wentz's actions were reckless, and a judgment for $3,850,004.83 was entered on July 14, 2016. R. p. 1199-1200. On September 7, 2016, after post-trial motions seeking contractual adjustments, an Amended Judgment was entered for $3,775,864.21. R., p. 319. St. Luke's filed this appeal on August 19, 2016. R. pp. 1201-1206.

C. Statement of Facts

On December 24, 2013, Mrs. Herrett suffered a stroke due to an air embolism being released into her bloodstream, caused by a mistake in the method used to remove a tube from her neck. Tr. p. 234.

Prior to December 24, 2013, Mrs. Herrett had numerous prior illnesses, injuries and complications that had nothing to do with the December 2013 stroke. She had cervical cancer in approximately 1988 and had her uterus removed. Tr. p. 411, Ll. 14-24. Due to radiation damage, her left kidney was removed, her gallbladder removed, her appendix removed, her bladder removed, and her colon removed necessitating both a urostomy and a colostomy, and a condition known as short bowel syndrome. Tr. p. 411, Ll. 14-24; Tr. p. 415, Ll. 2-10 Tr. p. 293; Ll. 17-25. She had had a previous stroke in 2003 that had resulted in right sided weakness, Tr. p. 281, L. 2-p. 283, L. 4 and caused her to have difficulty with memory. Tr. p. 281, Ll. 22-p. 282, L. 11. Mrs. Herrett had a blood clotting disorder. Tr. p. 281, Ll. 13-15. She suffered from significant kidney

disease in her one remaining kidney and had been diagnosed with Stage 3 kidney disease, including episodes of acute renal failure. Tr. p. 285, Ll. 3-8; Tr. p. 412, Ll. 3-4. Prior to the 2013 stroke, she was also chronically fatigued. Tr. p. 295, Ll. 20-25. Mrs. Herrett suffered from anxiety. Tr. p. 297, Ll. 4-6. She had numerous other medical conditions and symptoms through the years leading up to 2013, that resulted in treatment, including sepsis, depression, significant hip pain, vitamin deficiencies, chronic pain, numerous infections, short-term memory loss, panic attacks, double vision, weakness, etc. Tr. p. 285, L. 25-p. 286, L. 2, Tr. p. 286, Ll. 10-21; p. 292, Ll. 10-25; p. 293, Ll. 17-21; p. 294, Ll. 5-22; Tr. p. 297, Ll. 4-6; Tr. p. 416, Ll. 1-25.

Mrs. Herrett's December 2013 hospitalization resulted from acute renal failure and severe septic shock and was complicated by her many other medical conditions. Tr. p. 297, L. 24-p. 298. L. 3; Tr. p. 298, Ll. 5-9. Her condition resulted in kidney failure, heart failure, and she nearly died. Tr. p. 297, L.23-p. 298, L. 19; Tr. p. 298, Ll. 10-19; Tr. p. 604, Ll. 7-16. She was in critical condition. Tr. p. 299, Ll. 11-13. St. Luke's medical team cared for Mrs. Herrett, and after about two weeks, she was transferred to the inpatient rehab center to recover. Tr. p. 436, Ll. 6-9; Tr. p. 579, L. 23-p. 580, L. 1. On December 24, 2013, she was well enough to be discharged to outpatient rehabilitation, and taken home. Tr. p. 434, Ll. 2-4; p. 581, Ll. 15-22.

When Mrs. Herrett was preparing to go home from the hospital, Mr. Herrett asked about removal of a central line or central venous catheter (CVC)[1]. Tr. p. 436, Ll. 15-24. The nurse caring for her, Marilou Wentz, had never removed a CVC. Tr. p. 438, Ll. 9-12. The CVC is normally removed prior to transfer to inpatient rehab, so it was unusual to have such a line in a patient in that unit. Tr. p. 584, Ll. 13-23. Nurse. Wentz assumed the removal process was similar to removing an IV line, Tr. p. 472, Ll. 19-25; p. 473, Ll. 7-12, went to consult with another nurse

[1] A CVC is an entry port placed in Mrs. Herrett when she was in intensive care to allow for quick delivery of medication and liquid into her body. It had several ports. Tr. p. 584, Ll. 13-23.

on the floor, then returned with equipment, and began removing the line. Tr. p. 438, L. 17-0. 441, L. 18. Because of her training she thought she knew how to do this procedure, even though she had never done it, and she followed the required steps except that she neglected to lay Mrs. Herrett down. Tr. p. 464, Ll. 5-23. The removal of the CVC introduced an air embolism into Mrs. Herrett's body, and caused a stroke. Tr. p. 447, Ll. 16-24.

Mrs. Herrett was treated for the stroke at St. Luke's. Tr. p. 469, Ll. 17-25. She recovered from the effects of the stroke, and by mid-2014 was doing well. Tr. p. 606, Ll. 4-10; p. 607, Ll. 3-23; p. 615, Ll. 9-19. She had regained her strength and mobility, and was moving with only minimal assistance. Tr. p. 618, Ll. 3-16; p. 617, Ll. 3-25. Residual effects noted were some limits on her extended mobility, a right arm contracture, and some residual speech and language deficits. Dr. Wiggins specifically noted that by February 2014 Mrs. Herrett had made "extremely good progress," was getting around well and independently by April, and by June continued to be walking well and making good progress on rehabilitation goals. Tr. p. 606, Ll. 19-23; p. 615, Ll. 15-19; p. 617, Ll. 24-28; p. 618, Ll. 1-10; p. 619, Ll. 3-22.

However, in September/October, 2014 Mrs. Herrett was again hospitalized. Tr. p. 591, Ll. 15-25. The initial diagnosis was "failure to thrive" with indications that she was suffering from dehydration. Tr. p. 591, Ll. 21-25; p. 594, Ll. 24-25. She had lost weight, developed bed sores, and was becoming delusional. Tr. pp. 255-256. Medical staff determined that many of her medical issues were pre-morbid (caused by medical conditions that pre-existed the stroke) or because of non-stroke related issues. Tr. p. 603, Ll. 3-9 (dehydration had been an ongoing problem for 20 years); p. 621, Ll. 5-21; p. 623, Ll. 1-6 (metabolic encephalopathy); p. 623, Ll. 20-24 (vitamin deficiency); p. 624, Ll. 9-25 (urinary tract infection); p. 625, Ll. 13-19 (e coli infection).

II. ISSUES PRESENTED ON APPEAL

- The trial court erred in failing to grant a mistrial, despite finding that a court order and IRCP rules governing pretrial disclosure of expert testimony were violated, and St. Luke's was prejudiced.
    - The trial court's efforts to allow other testimony or offer instruction to the jury were woefully inadequate to cure the prejudice.
    - Since the late disclosure prejudiced St. Luke's, happened during the middle of trial, and would have necessitated unavailable expert testimony to adequately rebut it, only a mistrial could have cured the error.
- The trial court erred in allowing a different expert witness to express expert opinions that were also not disclosed prior to trial in violation of pretrial orders.
- The trial court failed, as matter of law, to properly instruct the jury on the correct legal definition of recklessness in this context.
- The trial court erred in failing to exclude testimony from a life care planning expert on future medical costs, where the testimony lacked foundation, because there was no medical causation testimony to support it.

III. STANDARD OF REVIEW

In reviewing the district court's ruling on a motion for mistrial in a civil case, the court applies an abuse of discretion standard of review. *Ballard v. Kerr*, 2016 Ida. LEXIS 228, 378 P. 3d 464 (2016). The decision on whether to declare or deny a mistrial is within the discretion of the trial court if an occurrence at trial has prevented a fair trial. *Id. See also Van Brunt v. Stoddard*, 136 Idaho 681, 39 P.3d 621 (2001). To show an abuse of discretion in denying a mistrial, defendant must show that its rights were prejudiced. *Weinstein v. Prudential Property & Casualty Ins. Co.*, 149 Idaho 299, 233 P.3d 1221 (2010). Such discretionary decisions must be within the bounds of discretion and according to applicable legal principles. *See Edmunds v. Kraner*, supra, citing *Lamar Corp. v. City of Twin Falls*, 133 Idaho 36, 981 P. 2d 1146 (1999). The Supreme Court reviews orders regarding discovery sanctions under an abuse of discretion standard. *Easterling v. Kendall*, 159 Idaho 902, 367 P. 3d 1214, 1221 (2016). In applying the

abuse of discretion standard, the Court employs a three step inquiry, determining: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the court acted within the boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason. *Mattox v. Life Care Centers of America, Inc.*, 157 Idaho 468, 473, 337 P.3d 627, 632 (2014) (*quoting McDaniel v. Inland Northwest Renal Care Group-Idaho, LLC,* 144 Idaho 219, 221- 22, 159 P.3d 856, 858-59 (2007)).

The propriety of a jury instruction is a question of law for the Supreme Court, and the Court exercises free review. *Ballard v. Kerr*, 2016 Ida. LEXIS 228, 378 P.3d 464 (2016). Reversal is appropriate where the instructions as a whole are misleading or prejudice a party's rights. *Id.*

A party may claim error in the admission of evidence where the ruling is "a manifest abuse of the trial court's discretion and a substantial right of the party is affected." *Van v. Portneuf Med. Ctr., Inc.*, 156 Idaho 696, 701, 330 P.3d 1054, 1059 (2014).

IV. ARGUMENT

A. The Trial Court Erred by Failing to Grant a Motion for Mistrial, Despite a Finding that a Court Order and IRCP Rules Governing Pretrial Disclosure of Expert Testimony were Violated; St. Luke's was Prejudiced.

> *But we do not look favorably upon discretionary decisions by district judges that encourage last-minute witness disclosure and unreasonably prevent (parties) from responding, particularly in complex medical malpractice cases where experts will be furnishing the jury with the bulk of the necessary, and often technical, facts.*

Edmunds v. Kraner, 142 Idaho 867, 873, 136 P.3d 338, 344 (2006).

A decade before the trial in this action, Chief Justice Burdick clearly identified the peril of ignoring expert witness disclosure rules in a medical malpractice case. A unanimous *Edmunds* Court noted that, although the decision to admit expert testimony may rest on a discretionary

decision, that discretion is not unlimited. The circumstances of disclosure must significantly limit the bounds of discretion. *Edmunds, supra.*

Objections based on failure to disclose an expert opinion can arise on summary judgment, during pretrial motions *in limine*, or at trial, and each step in the proceedings may require a different boundary for the court's discretion. This makes sense: the later the opinion is presented, the less likely the other party can respond through discovery, cross-examination, or preparation of other witnesses with opposing opinions. Thus, the later the undisclosed opinion appears, the greater the prejudice.

To preserve the right to a fair trial, the bounds of discretion are significantly more limited when an expert opinion is first disclosed at trial. While there may be a very rare case where prejudice does not result from such a mid-trial disclosure, examples are non-existent in Idaho case law after an exhaustive search. The Court must intervene to guide the lower courts by disapproving a trial court decision where: (1) there was a complete failure to disclose the potential expert witness testimony, (2) the testimony was elicited mid-trial, and (3) there was no opportunity for the opposing party to anticipate that the opinion would be offered, effectively cross-examine, or offer competent expert medical testimony to rebut the undisclosed opinion.

No Idaho precedent has allowed undisclosed expert testimony to be offered for the first time during trial. In fact, in a leading case, where expert testimony was introduced mid-trial despite lack of disclosure, this Court reversed and remanded for a new trial. *Radmer v. Ford Motor Co.*, 120 Idaho 86, 813 P.2d 897 (1991). Perhaps this is because the prejudice that flows from nondisclosed experts first offered during trial is palpable.

Expert testimony should have been excluded when, in defiance of a pretrial order, it was not disclosed prior to trial. Here, Dr. Wiggins was allowed to testify that Mrs. Herrett suffered a

devastating "secondary event" in Septe4mber 2014 resulting in continuing brain damage. Not only did the trial court here fail to exclude the testimony, the trial court allowed the witness to testify, and then expand on the testimony. In later ruling on a motion for mistrial, the trial court recognized that the opinion was not disclosed, that it was a medical malpractice case, and that St. Luke's was prejudiced, but refused to grant a mistrial. Instead the court rewarded the nondisclosure by anemic attempts to "cure" incurable prejudice.

1. Setting the Stage: The Pretrial Orders and Motions *in Limine*

First, we must fully set the stage by examining the course of events leading to this grave error. There is no question that the trial court ordered the parties to disclose any expert medical testimony to be presented at trial. The parties stipulated to a deadline for disclosing expert witnesses. R. p. 44.[2] The trial court issued an "Order Approving Stipulated Scheduling Order, Pretrial and Jury Notice" on July 17, 2015, thus requiring both parties to "disclose all information required by Rule 26(b)(4) of the Idaho Rules of Civil Procedure regarding expert witnesses." R. p. 48.

As this Court is well aware, Rule 26 requires experts and their opinions be fully

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[2] This Court is very familiar with the expert disclosure rules, but for the convenience of the Court, these are the required disclosure rules for a "non-retained expert" like Dr. Wiggins, who was a treating physician:

> (ii) What Must be Disclosed: Non-Retained Experts. For individuals with knowledge of relevant facts not acquired in preparation for trial and who have not been retained or specially employed to provide expert testimony in the case:
>
> - a statement of the subject matter on which the witness is expected to present evidence under Rule 702, 703 or 705, Idaho Rules of Evidence, and
> - a summary of the facts and opinions to which the witness is expected to testify.

I.R.C.P. 26(b)(4)(ii).

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Idaho Rules of Evidence 702.

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.

Idaho Rules of Evidence Rule 703.

disclosed. This includes, for non-retained experts, a complete statement of the subject matter of evidence to be presented, and all facts and opinions to which the witness is expected to testify. See footnote 2.

Following this scheduling order, both parties submitted numerous motions *in limine.* The district court granted some unrelated motions, saying:

> "Both parties seek an order that precludes the presentation of expert testimony that has not been disclosed. The Court grants BOTH of these motions...In doing so, the result is no more than what the Court's scheduling order and case law requires. If there has not been compliance with the discovery rules by this time-one week prior to trial-there is no justification to permit the use of undisclosed evidence."

R. p. 1015. The court also recognized: "In making this ruling the Court is fully aware that trials should not be by 'ambush.'" R. p.1016.

2. Dr. Wiggins was identified, prior to trial, as merely a treating physician, who would testify about her treatment of Mrs. Herrett prior to and following the December 2013 stroke.

Despite these pretrial orders and rulings, Dr. Wiggins, a rehabilitation doctor, was disclosed by Plaintiffs only as a treating provider. The pretrial disclosure for Dr. Wiggins is very short and simply states:

> Dr. Wiggins was one of Plaintiff's treating physicians and may be called to testify as to her findings and conclusions as set forth in her medical records including issues related to the removal of the central line catheter causing an air embolism which resulted in a venous embolic stroke. The doctor is expected to testify that the treatment provided as a result of the stroke was reasonable and necessary and that the improper removal of the CVC was a substantial contributing factor in causing the injury. To the extent that such testimony may constitute expert medical opinions, she is designated here as an expert witness, however, she is not retained in the usual sense of a consulting expert witness. At this time, this doctor is not being compensated as an expert.

See R., p. 66. The disclosure limited Dr. Wiggins' testimony to the rehabilitation treatment provided after Mrs. Herrett's December, 2013 stroke. The disclosure disclaimed her status as an

"expert" and limited her testimony. It did not detail any opinions, much less the facts and data relied upon. The disclosure did not mention testimony regarding any September 2014 event, causation of that event, interpretation of subsequent testing, continuing deterioration of the brain, or causation of any continued harm.

3. St. Luke's presented a defense that did not anticipate Dr. Wiggins' expert testimony.

St. Luke's admitted negligence in the removal of the central line. The main issue was damages. Central to the damages issue was Mrs. Herrett's pre-December 2013 and unrelated medical conditions, and the care required for those conditions. There was no dispute that Mrs. Herrett had been hospitalized and treated many times for numerous medical conditions. See Statement of Facts, pp. 7-9. These conditions were treated extensively prior to the stroke, and treatment for some of them continued after the stroke. Consequently, a key issue at trial was the cause of Mrs. Herrett's hospitalization nine months post-stroke in September 2014. St. Luke's sought to show that Mrs. Herrett's condition had greatly improved due to treatment for the stroke, and that the September hospitalization was required by other medical conditions. This was supported by records from her treating physiatrist, Dr. Wiggins, and other medical professionals. Tr. p. 301, Ll. 4-24; Exhibit D. On December 24, 2013, immediately prior to the stroke, Mrs. Herrett's physical condition required her to use a walker for mobility. Tr. p. 605, Ll. 5-10; Exhibit D, p. 1541. After treatment post-stroke, Mrs. Herrett had left the hospital in February 2014 without a cane, walker or wheelchair, and her speech was fully recovered. Tr. p. 301, l. 10-p. 302, L. 4; p. 304, Ll. 12-19; p. 305, Ll. 11-20, p.615, Ll. 15-19. She continued to improve through the summer of 2014. *Id.* and p. 618, Ll. 3-5; p. 619, Ll. 15-21 (walking without assistance). She was then hospitalized in September 2014 for weight loss, dehydration, anxiety and functional decline, all of which were pre-existing, continuous problems for Mrs. Herrett. Tr.

p. 594, Ll. 22-p. 595, Ll. 20; p. 596, Ll. 8-9; p. 603, Ll. 3-11; p. 604, Ll. 4-8, p. 621, Ll. 9-19; Exhibit D, p. 1537 (high nutrition risk); p. 1540 (anxiety); p. 1545 (significant appetite fluctuations and weight changes, fluid shifts). In addition, several non-stroke-related causes were involved in her September 2014 hospitalization. *See* Statement of Facts, pp. 9-10. St. Luke's had defended the damages case based on the premise that Mrs. Herrett had recovered from the stroke to a great extent, and any subsequent medical expenses (and accompanying noneconomic damages) incurred in mid-2014 and beyond were due to treatment for her other medical conditions.

4. The direct and cross examinations of Dr. Wiggins did not address any issues relating to encephalomalacia or a continuing brain injury in September of 2014.

During direct and cross examination, Dr. Wiggins was not asked about continuing brain injury or new brain damage in September 2014. Tr. pp. 576-627. As was apparent from the cross examination of Dr. Wiggins, St. Luke's theory was that, while Mrs. Herrett had suffered a stroke in December of 2013, she was recovering well from that event during 2014. The medical records showed Mrs. Herrett made good progress in recovering from the stroke. St. Luke's was thus led to believe, based on the pretrial proceedings, that Dr. Wiggins' testimony was focused upon the rehabilitation treatment given to Mrs. Herrett. Tr. p. 775-776.

5. It was only upon re-direct examination that the Herretts' attorney asked Dr. Wiggins about a secondary event, an opinion not disclosed in any expert witness disclosure.

On re-direct examination, the Herretts' attorney immediately attempted to use ambush tactics to bring out a new, undisclosed expert opinion from Dr. Wiggins. The testimony elicited was about a condition called "encephalomalacia." Dr. Wiggins, referring to a medical consultation done by another doctor, Dr. Laura Musteti-Oprea, (Exhibit L, pp. 31-32) who did not testify at trial, offered this medical opinion:

> "Encephalomalacia is softening of the brain tissue, and it typically happens in an area that's been damaged, so it's basically damaged brain tissue – that..."

Tr., p. 628, Ll. 10-12. *See also* Exhibit TT (CT scan). St. Luke's objected, because Dr. Wiggins was not disclosed as an expert to offer this opinion, or to opine on encephalomalacia or the medical records in question (which were completed nine months after the stroke), or to opine on the causal connection between this medical condition and Mrs. Herrett's stroke nine months before. Tr. p. 628, Ll. 13-19. The court excused the jury and heard argument. Tr. p. 634, Ll. 8-14. The court recognized that its prior order and I.R.C.P. 26 required disclosure of expert medical opinions, but then ruled that the examination could continue solely based upon the fact that the witness was referencing a medical record that had been disclosed. *Id.* at Ll. 1-14.

Prior to Dr. Wiggins' testimony on re-direct, there was no testimony about a "secondary complication" or "secondary event" in the fall of 2014. No expert witness disclosure referenced "encephalomalacia" or a continuing brain injury nine months after the stroke. Dr. Wiggins' undisclosed opinion opened up two new areas: (1) causation of any continuing injury; and (2) whether this continuing injury resulted in a devastating injury, i.e., that Mrs. Herrett's brain had turned to "mush." Tr. p. 635, L1. 15-21. No one was disclosed to testify that Mrs. Herrett's brain continued to deteriorate after December 24, 2013, or that new areas of the brain were now being damaged. This was a new, undisclosed expert medical opinion about a progressive brain deterioration and a resulting devastating injury.

6. In initially ruling the testimony was admissible, the trial court used the wrong legal standard.

By initially allowing the testimony, the trial court failed to examine whether the plaintiffs properly disclosed Dr. Wiggins' expert opinion on continuing brain damage, which is the proper standard to use in ruling on admissibility of the testimony. Tr. p. 634, Ll. 8-14. When St. Luke's

objected to the testimony, the Herretts' counsel argued that the testimony was permissible because the defense had "opened the door." Tr. p. p. 629, Ll. 11-17. This Court can scour the transcript for any mention of the word "encephalomalacia" prior to Dr. Wiggins' testimony. In fact, a quick review of the court reporter's key word index shows that the term "encephalomalacia" is never mentioned at trial until the beginning of Herretts' re-direct examination of Dr. Wiggins, Tr. p. 627. Thus, St. Luke's never "opened the door" on cross-examination. In fact, Dr. Wiggins was the first person to mention the term.

The trial court was distracted by arguments that the Herretts' counsel made: (1) that the witness was being asked to discuss a term that had been raised by the defense on cross examination (an untrue assertion, see above, Tr. p. 627); and (2) that the medical records had been disclosed and used by both parties. Tr. p. 633, Ll. 1-4. The defense objection was not whether the opinion was relevant (relating to Mrs. Herrett's medical condition or the need for hospitalization), or whether there was foundation laid (i.e. the medical records were discussed and disclosed), or whether the line of questioning was within the proper scope of re-direct (i.e., that the defense had opened up the subject on cross or raised an area of evidence previously inadmissible). The defense objection was that Dr. Wiggins had not been identified as an expert to offer this opinion, her opinion and the basis for it had not been disclosed, and thus must be excluded under the court's pretrial order and I.R.C.P. 26. Thus, in making the discretionary decision to admit the initial testimony, the trial court failed to recognize the proper legal standard to be used here. See *Edmunds v. Kraner*, supra, citing *Lamar Corp. v. City of Twin Falls*, 133 Idaho 36, 981 P. 2d 1146 (1999) discretionary decisions must be within bounds of discretion and according to applicable legal principles).

If the Herretts believed that testimony about continuing brain deterioration may be

needed to show a causal connection between the December injury and the September 2014 hospitalization, they could and should have properly disclosed such an expert opinion, from Dr. Wiggins or another expert. A party does not waive the right to pretrial disclosure of expert testimony by questioning a witness about issues.

The court then allowed the examination to continue, compounding the error, and Dr. Wiggins expanded upon the undisclosed opinion:

> Encephalomalacia is basically a secondary complication. So you have an area that's injured, and the tissue dies, and then what happens with the brain tissue as it softens, it kind of starts breaking up, basically kind of turns to mush. So that's a secondary event after an injury such as the stroke. So you don't see encephalomalacia without something causing it.

Tr. p. 635, Ll. 15-21) (emphasis added).

When asked what effect this had on Mrs. Herrett, Dr. Wiggins answered:

> Well, since it's a brain, you don't know exactly. Everybody's brain is different, but the fact that we saw - - that you see continued deterioration of her brain is very worrisome for damaging not only that area but areas around it as well. So basically there are areas that are changing.

Tr. p. 635, L. 25 – 636, L.4) (emphasis added).

Dr. Wiggins was then asked, "And we talked about Mrs. Herrett starting to go downhill, I believe was the term." And, "Does this brain softening have anything to do with that?[3] Dr. Wiggins responded, "Yes, I think it does." Tr. p. 636, Ll. 12. When asked to explain, Dr. Wiggins testified:

> Well, it shows that her brain was continuing to deteriorate, so she had the stroke, and that was the one-time injury to her brain, but the area that was damaged continued to change over time, so I think that fits with the clinical picture that we saw, the deterioration.

[3] Defense counsel again objected based on failure to disclose this expert opinion, but was overruled. Tr. P. 636, Ll. 10-11.

Tr. p. 636, Ll. 15 – 19)(Emphasis added).

When asked if this continuing deterioration was a cause of the anxiety and psychosis reported by Mrs. Herrett in September of 2014, Dr. Wiggins testified:

> I think so. It's in her left frontal lobe. The frontal lobe is personality, it's basically what makes you who you are, so the changes we are seeing fit with that. People with frontal lobe injuries tend to have personality changes.

Tr. P. 636, Ll. 22-25).[4] Later in her testimony, Dr. Wiggins reinforced the prejudicial testimony about encephalomalacia by stating: "Once encephalomalacia starts, brain tissue doesn't reassemble." Tr. p. 642, Ll. 7-8.

The court solicited questions from the jury, and it was clear the impact this testimony had, based on the questions the jury submitted. The jury questions were read into the record by the trial court in ruling on the motion for mistrial:

> One question, quote, in your opinion, do you believe Mrs. Herrett's brain will continue to deteriorate, unquote.
>
> Second question, is it normal for a stroke victim to—degress is the word they use, I think digress is what they meant—later after progressing initially?
>
> The third question, the softening of the brain, can it be caused by other factors than a stroke?

Tr. p. 787, Ll. 18-25. The questions posed by the jurors illuminate the incurable prejudice that resulted from allowing Dr. Wiggins' undisclosed opinions. The jury immediately focused on continuing brain damage and the possibility of further deterioration. This unreasonably magnified the alleged damage associated with the CVC removal and eliminated the jury's focus on the correct measure of damages-Mrs. Herrett's marginal change in condition after the

[4] Dr. Wiggins' repeated use of the words "I think" in offering her undisclosed opinions underscores the fact that she was testifying outside the scope of her expertise, an objection that St. Luke's would have emphasized more in pretrial if the opinions had been disclosed.

December 2013 stroke.

7. This new expert witness opinion was a total surprise to St. Luke's, and critical to the defense that Mrs. Herrett's condition had significantly improved.

The term "encephalomalacia" is contained in the medical records. Exhibit L, p. 2161. However, there was no mention in the medical records that this condition had continued to cause brain damage post-stroke, continued into 2014, or would worsen, and no expert had been disclosed by the Herretts regarding the "secondary event" of encephalomalacia. See R. pp. 54-75. There was no statement by any provider in the medical records that "encephalomalacia" is a progressive, debilitating brain injury caused by the stroke and Mrs. Herrett's brain was "continuing to deteriorate." Tr. p. 775, Ll. 24-25; p. 776, Ll. 1-13. There was no prior testimony that Mrs. Herrett was continuing to decline because of this condition, and the expert disclosure for Dr. Wiggins certainly did not address on this issue at all. R. p. 66.

Dr. Wiggins' deposition was not taken. Tr. p. 776, Ll. 20-23. The record also indicates that her specialty was physiatry, on physical medicine and rehabilitation. Tr. p. 576, Ll. 22-24. This specialty is focused on improving physical function, and not on the causation of brain injuries. Tr. p. 577, Ll. 16-21. There was no indication prior to the third day of trial that she might be called to testify about the causation of brain injuries, and continuing damage to Mrs. Herrett's brain allegedly caused by this secondary event. Tr. p. 776, Ll. 1-13.

8. The trial court revisited the ruling on admissibility, and again used the wrong legal standard and incorrect facts.

After Dr. Wiggins was discharged, the trial court revisited this issue, and compounding the initial error by using an incorrect standard to judge both admissibility and prejudice. Tr. P. 644, Ll. 3-16. The trial court specifically refused to look at the opinion offered as compared to the disclosure (saying only that he "understood" that argument without ruling on the issue). The

trial court then ruled that the testimony was not prejudicial because "deterioration of the brain" is "what strokes do," and thus the testimony was permissible. Tr. p. 644, Ll. 11-13. The court used a relevancy standard, not an expert disclosure standard. Under the latter standard, it should not matter whether the opinion was relevant, only whether it was disclosed. The trial court made this ruling despite the fact that the medical record used in Dr. Wiggins' testimony was not her treatment record (Exhibit L, R. p. 2129), and no one had ever mentioned the word "encephalomalacia" prior to the moment of Dr. Wiggins' re-direct testimony. Using that incorrect standard, the trial court again ruled that the testimony was admissible. Tr. p. 644, Ll. 14-16.

St. Luke's asked to strike the testimony, based on failure to disclose the expert opinion, and the court denied that motion. Tr. p. 647, Ll. 9-16. St. Luke's then indicated it would be filing a motion for mistrial. Tr. p. 649, Ll. 3-11.

9. The trial court then erred in failing to grant the mistrial.

Based on this surprise undisclosed expert testimony, the potentially devastating consequences of this opinion (that Mrs. Herrett's brain had now turned to "mush") should be obvious.[5] It was simply impossible for the jury to "unhear" the testimony. It was impossible to cross-examine Dr. Wiggins without further emphasizing the testimony. Counsel for St. Luke's was unprepared to cross-examine on this undisclosed opinion, and declined to do so. Tr. pp. 640-641.

The trial court heard the mistrial motion after the July 4th holiday weekend, at the beginning of Day 6 of the jury trial, and after the plaintiffs had presented their entire case. R. pp. 228-238; Tr. pp. 772-798; R. pp. 1193-1194. Under Rule 48, a mistrial is appropriate if there is

[5] The significance of this testimony was evident to the trial court, as he stated: "We have a new trial. Dr. Wiggins comes back in here, she testifies exactly what she's testified to. Okay? Which if I was the plaintiffs, I would put that on. I think that's significant evidence." Tr. p. 784, Ll. 5-8.

an occurrence at trial that has prevented a fair trial. I.R.C.P. 48 ("the court may declare a mistrial...if it determines an occurrence at trial has prevented a fair trial); *Weinstein v. Prudential Property and Casualty Ins. Co.*, 149 Idaho 299, 233 P. 3d 1221 (2010) (mistrial appropriate where defendant's rights are prejudiced). Allowing undisclosed expert testimony beyond the expertise of this expert, in a medical malpractice case about a complicated medical issue, is certainly the type of "occurrence" anticipated by the rule.

A motion for mistrial is addressed to the trial court's sound discretion, but that discretion is abused if the court misperceives the standards by which to judge the issue, or acts beyond the bounds of that discretion. Here, the trial court misperceived the correct legal standard for the mistrial motion. The court failed to grant a mistrial despite these facts:

- The trial court ruled that this expert testimony/opinion was not previously disclosed, and the plaintiffs' actions in offering the testimony violated the discovery order ("disclosure...unfortunately too generic to cover that particular issue."). Tr. p.795, Ll. 10-15.
- The trial court ruled that the violation prejudiced St. Luke's. Tr. p. 796, Ll. 6-13.
- There was no opportunity to effectively cross examine on the opinion. Tr. pp. 640-641.
- There was no opportunity to provide opposing expert testimony from a neurologist or other medical expert with the proper expertise. Tr. pp. 776-777; 783.

Incredibly, prior to denying the motion for mistrial, the trial court recognized the testimony was critical to the case. The court stated: "Why this is critical is, it's for obvious reasons. The whole, I won't say the whole, but the vast majority of the claims in this case relate to future treatment . . . and if a jury believes that Mrs. Herrett has a, what I call a, I think that the term is a progressive stroke, . . . is there's a whole world of difference between somebody who has a stroke where their physical situation has, quote, stabilized, . . . Versus a stroke that progresses because it certainly impacts their level of care. So there's the causal issue in terms of

damages in this case, and why that particular statement is critical." Tr. pp. 795, L. 15-796, L. 4 (emphasis added).

The trial court recognized that St. Luke's was prejudiced. The court stated: "I understand the issue of prejudice to the defendant. I truly do. . . . The question is whether there can be a reasonable remedy because I do find certainly there's a level of prejudice to the defense here." Tr. p. 796, Ll. 5-13. After days of trial and several arguments, the court finally began analyzing the issue under the proper standard, but still failed to reach the correct conclusion.

10. No effort at "curing" the prejudice was sufficient in this case.

Incredibly, instead of granting the motion for mistrial based upon the misconduct and the prejudice, the trial court decided that the prejudice could be mitigated by: (1) offering a "cautionary instruction" and (2) using an unprepared physiatrist to rebut the testimony of Dr. Wiggins. Tr. pp. 796, Ll. 14-24. St. Luke's did its best to use both of these methods offered by the trial court, while preserving its objection and request for a mistrial. Tr. p. 798, Ll. 1-5.

Neither of these proffered "cures" could possibly hope to "unring the bell." St. Luke's indicated that properly rebutting the new opinion would require testimony from a neuroradiologist and a neurologist, both of whom would be impossible to obtain on such short notice in the midst of trial. Tr. p. 776, Ll. 9-13. Springing this new opinion on St. Luke's in front of the jury (and really interjecting an entirely new causation element into the case) prevented St. Luke's from properly rebutting the testimony. Offering a halfhearted "cure" of the error, by allowing St. Luke's expert physiatrist to testify about encephalomalacia, and offering an instruction to the jury indicating that the brain damage was not continuing, served only to highlight the opinion.

The court's eventual finding of a Rule 26 violation and prejudice should have compelled a mistrial. When the trial court does not exercise its discretion using the correct legal standard,

bases the decision on a misperception of the importance of various factors, or fails to use an exercise of reason, the decision should be reversed. *Sun Valley Shopping Ctr. v. Idaho Power Co.,* 119 Idaho 87, 803 P.2d 993 (1991). In *Sun Valley* this court noted that where the trial court did not give appropriate focus to its inquiry, and focused upon the wrong criteria, it did not act consistently with the legal standards applicable to the choice it sought to make. That is exactly what happened here, where the trial court, in admitting the testimony, focused upon issues of relevance, foundation, etc. The trial court's eventual findings that Rule 26 and the court's order were violated, and that St. Luke's was prejudiced by the violation, should have compelled a mistrial under *Radmer, infra.*

11. The trial court's effort to instruct the jury was woefully inadequate to cure the prejudice.

The trial court, after finally recognizing the grave error which resulted in prejudice, failed to grant the mistrial under the mistaken belief that the error and prejudice could be ameliorated. Nothing could have cured this error, because Dr. Wiggins, a physiatrist, testified about an undisclosed opinion, thus depriving St. Luke's the opportunity to challenge Dr. Wiggins' qualifications to offer the opinion, prepare for cross examination, and secure other expert testimony to rebut the opinion.

After denying the motion to strike, the trial court asked the parties to agree on a limiting jury instruction that might minimize the impact of the testimony. Tr. p. 796, Ll. 21-25. But at the same time, the court recognized that remedy was insufficient to cure the prejudice.

> If you want a cautionary instruction, I'll give it, but I agree with that all that does is it tends to—I don't even know how to word that..."

Tr. p. 796, Ll. 21-24 (referring to Mr. Gjording's argument: "A curative instruction, all that does is highlight it." Tr. p. 780, Ll. 18-19). St. Luke's made it clear that, even if it agreed to an

instruction, there was no way to cure the error. Tr. P. 780, Ll. 13-25 ("But I just don't think there is a way to cure it.")

The parties did eventually agree on an instruction, with St. Luke's reluctantly agreeing. However, the instruction did not eliminate or strike Dr. Wiggins' testimony, nor did it cure the damage done by the undisclosed opinion. It read: "The parties agree that it is a fact in this case that Joyce Herrett does not have continuing brain deterioration from her stroke that occurred on December 24th, 2013." Tr. p. 1134.[6] This instruction was not given with the rest of the instructions, was read out of context on the last day of testimony, with no explanation with no reference to Dr. Wiggins. *Id.*

A jury, having already heard Dr. Wiggins' testimony, could have easily concluded that the only clarification was whether Mrs. Herrett's brain continued to deteriorate beyond the fall of 2014, and into 2016, the time of trial. Or, the jury could have assumed that the instruction simply meant that the deterioration from the encephalomalacia had stopped as of the time of trial. Since there was no explanation, the jury could have concluded that Mrs. Herrett's brain continued to deteriorate between December 2013 and September 2014 and then perhaps even continued to deteriorate up to the time of trial. Dr. Wiggins testified that "there are areas that are changing" in the brain, and that the brain "continued to deteriorate." Tr. p. 636, Ll. 1-19. The instruction also did not address or refute the testimony about continuing brain deterioration from December 2013 to September 2014. Dr. Wiggins' testimony was not "stricken" nor refuted by the instruction.

Allowing this testimony with only a confusing and vague limiting instruction was not a "harmless" error. Clear evidence of the lack of impact of this "limiting" instruction is the jury's

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[6] This case is thus distinguishable from *Hansen v. Howard O. Miller, Inc.*, 93 Idaho 314, 318, 460 P. 2d 739 (1969) where the curative instruction not only struck the testimony, but plainly instructed the jury that the plaintiff was not negligent by reason of failure to wear a seat belt. The vague instruction here, not referencing Dr. Wiggins testimony or its impact, and confusingly addressing continuing brain injury, is not the type of instruction that could cure the error.

special verdict. The special verdict was broken out into sections, and the damages attributable to the September 2014 hospitalization were separated. The jury was asked this question: "Was Mrs. Herrett's September/October 2014 hospitalization proximately caused by the December 24, 2013 stroke?" R. p. 272. The jury responded affirmatively. The jury accepted Dr. Wiggins' testimony that there was continuing damage to Mrs. Herrett's brain into the fall of 2014, and that the hospitalization in September was due to the stroke and continuing brain damage. Testimony that Mrs. Herrett's brain had turned to mush by September 2014, necessitating her second hospitalization, was key to that disputed fact. The surprise testimony from Dr. Wiggins left the defense with no meaningful response to her opinions concerning brain deterioration or the jurors' many questions about the impact of this testimony.

12. Since the late disclosure happened during the middle of trial, and would have necessitated unavailable expert testimony to adequately rebut it, only a mistrial could have cured the error.

The court allowed St. Luke's to elicit undisclosed expert testimony from one of its own expert witnesses, Dr. Cox, to rebut Dr. Wiggins' testimony, even though Dr. Cox had not been disclosed as a witness on that point. However, St. Luke's pointed out to the court that it did not believe that a physiatrist was qualified to offer an opinion on encephalomalacia and brain damage. St. Luke's indicated to the court that the only effective medical testimony on this point should come from a specialist in neurology.

> Mr. Gjording: Quite simply, Your Honor, we would have prepared our defense significantly different. We would have retained a neurologist, we would have retained a neuroradiologist at the minimum to test whether or not this indeed was a continuing injury and to test whether or not the personality changes, et cetera, were a result of the initial stroke and the continuing injury as expressed by Dr. Wiggins.
>
> In short, Your Honor, we're not as prepared as we would have been. We cannot present what we think would be sufficient evidence to meet these new undisclosed opinions, and we're

prejudiced.

Tr. p. 776, Ll. 7-17. See also Tr., pp. 784-785. The trial court asked: "Is it possible for the defense at this 11th hour to secure a neurologist to come in here and offer the opinions that you think your partner was talking about?" and counsel responded: "I think it's impossible." Tr. p. 789, L. 8-13 (this conversation occurred on Day 6 of the jury trial, at the conclusion of the plaintiffs' case).

The trial court suggested that a cure would be to have Dr. Cox testify to rebut Dr. Wiggins, counsel responded:

> MS. FOUSER: (Referring to the court's suggestion that Dr. Cox should testify to rebut Dr. Wiggins) . . . Well, I'm not sure I can answer that exactly. I mean, I would imagine if he's not the most qualified we'd get a neuroradiologist or neurologist, but he could address if, but it was never part of our preparation or plan. And we never disclosed anything about it, of course.

Tr. p. 777, Ll. 14-18.

Counsel for St. Luke's also told the court "in our opinion it cannot be done effectively. And we're prejudiced." Tr. p. 777, Ll. 22-23. Counsel pointed out to the court that it had objected to Dr. Wiggins testifying on this point, as it was beyond her qualifications, so the same objection would apply to Dr. Cox.

> Mr. Gjording... Your Honor, they both are physiatrists, they are rehabilitation doctors. They are not specialists in damage to the brain. In my opinion, lay opinion as it is, neither Dr. Wiggins or Dr. Cox are qualified to the degree that needs to be addressed here by a specialist such as a neurologist or a neuroradiologist. Probably in combination those two. . . . I don't think theirs is qualified to speak to it. We objected to that, and our Dr. Cox would be qualified to address it generally, but not specifically.

Tr. pp. 790-791, L. 18-3.

The court gave St. Luke's a Hobson's choice: leave Dr. Wiggins' prejudicial undisclosed opinion unchallenged, or attempt to rebut it with the halfhearted, unprepared opinion of Dr. Cox.

St. Luke's made it clear that neither was an acceptable option.

After being forced to continue the trial, and attempting to piece together a response to the surprise testimony, St. Luke's did ask their own expert physiatrist, Dr. Cox, to address the issue of encephalomalacia (under protest, as noted above). Dr. Cox made it a point to indicate that the best person to testify about the issue would be a neuroradiologist: "Q. And what would a radiologist—would it be helpful to have a neuroradiologist? A. Yeah. I honestly have never seen a neuroradiologist use the word progression in that situation." Tr. p. 902, Ll. 2-5. Much of Dr. Cox's testimony was simply reading the reports that Dr. Wiggins had referred to, and trying his best to interpret the results of a CT scan. Exhibit L. He attempted to speak to the mindset of the radiologist who had conducted the testing. Tr. p. 900, Ll. 15-17 ("Q. And did the radiologist find any type of ongoing, continuing, or progressive stroke occurring? A. No."). Dr. Cox basically read from the records for much of his testimony about this issue.

> A. I think when you look at the report, it's contradictory because they talk about progression of encephalomalacia, which would imply that it's somehow worsening or changing. They make that statement, but yet later on they say, no new areas of encephalomalacia or edema. So there's---you can't have progression but not have new areas.

Tr. p. 901, Ll. 20-25. All this testimony did was highlight this issue, and reinforce Dr. Wiggins' testimony, rather than eliminating it from the case, which should have been the result of enforcing the court's order and Rule 26. The jury was asked to choose between Dr. Wiggins' theory of a secondary event, and continuing brain damage ("mush") resulting from that event, and Dr. Cox's opinion that the September CT scan did not indicate that brain damage continued after the 2013 stroke.[7]

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[7] After reviewing nine months of medical treatment post-stroke with Dr. Cox, counsel asked:

> Q. Now, in your 24 years of experience, have you ever seen continuing brain damage occur nine months after the initial injury?

St. Luke's clearly demonstrated that the error could not be cured by inadequate testimony of another medical professional.

13. The mistrial should have been granted. The case should be reversed and remanded for a new trial.

Applicable Idaho precedent should have compelled the trial court to exclude the testimony or, once the testimony was mistakenly admitted and prejudice found, grant a mistrial. In reviewing the district court's ruling on a motion for mistrial in a civil case, the court applies an abuse of discretion standard of review. *Ballard v. Kerr*, 2016 Ida. LEXIS 228, 378 P. 3d 464 (2016). The decision to declare a mistrial is within the discretion of the court if an occurrence at trial prevented a fair trial. *Id., see also Van Brunt v. Stoddard*, 136 Idaho 681, 39 P.3d 621 (2001). To show an abuse of discretion, defendant must show that its rights were prejudiced. *Weinstein v. Prudential Property & Casualty Ins. Co.*, 149 Idaho 299, 233 P.3d 1221 (2010). Here, the prejudice to St. Luke's' right to a fair trial is evident, and, most compellingly, the trial court found that St. Luke's was prejudiced.

Radmer v. Ford Motor Co., 120 Idaho 86, 813 P.2d 897 (1991) is directly on point. In *Radmer*, an accident reconstructionist testified at trial. At the conclusion of the expert witness's testimony, the defense filed a motion for mistrial, judgment n.o.v., and for a new trial, on arguing that the expert testimony had not been disclosed prior to the trial. The trial court denied the motions. On appeal, this Court reversed, holding that: (1) the plaintiffs had a duty under I.R.C.P. 26(e) to supplement their responses with respect to the subject matter and substance of their expert's testimony; and (2) their failure to supplement discovery responses violated Rule 26(e)

A. Not unless they had a separate or distinct event.
Q. Such as what?
A. A separate stroke or a new stroke.
Q. Unrelated to the first stroke?
A. Correct.
Tr. p. 899, L. 25-p. 900, L. 7.

and prejudiced the car company. *Id.*

Radmer held that a fundamental premise of a fair trial process is to provide a party with an opportunity for full cross-examination. Effective cross-examination often cannot be done without resort to disclosures and pretrial discovery. *Id.* This is especially true with expert testimony in a malpractice case. Before an attorney can even hope to address an unfavorable expert opinion, s/he must have some idea of the opinion, the basis of that opinion, and the facts and data relied upon. If the attorney is required to react mid-trial to an undisclosed opinion, they will have insufficient time to recognize and expose vulnerable spots in the testimony, and/or seek out other expert testimony to adequately rebut the evidence. *Radmer, supra.*

In *Radmer* this Court ruled that failure to meet the requirements of I.R.C.P. 26 should have resulted in exclusion of the evidence. The Court recognized the bedrock principle of fairness that "while trial courts are given broad discretion in ruling on pretrial discovery matters, reversible error has been found in allowing testimony where Rule 26 has not been complied with." *Id. See also Zolber v. Winters*, 109 Idaho 824, 712 P.2d 525 (1985) (court remanded for a new trial; ability of defendants to present case substantially prejudiced by plaintiff's failure to supplement and/or clarify answers to interrogatories concerning expert witness testimony).

Radmer cited grave concerns about admitting late-identified testimony. Those concerns are heightened when expert testimony is involved.

> In cases [involving expert testimony], a prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent. Effective cross-examination of an expert witness requires advance preparation . . . Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side. If the latter is foreclosed by a rule against discovery, the narrowing of issues and elimination of surprise which discovery normally produces are frustrated.

Id. at 89, 813 P.2d at 900 (quoting Advisory Committee Notes, F.R.C.P. 26). *Radmer* cited other

cases where reversible error was found in allowing testimony after Rule 26 violations. *See Smith v. Ford Motor Co.,* 626 F.2d 784 (10th Cir.1980); *Coleco Industries, Inc. v. Berman*, 567 F.2d 569 (3d Cir. 1977); *Holiday Inns, Inc. v. Robertshaw Controls Co.*, 560 F.2d 856 (7th Cir.1977). The Court then concluded that a mistrial should have been granted.

> Radmers breached their obligation to supplement their discovery responses prior to trial, as required by Rule 26, and as a result Ford was unprepared to meet and effectively challenge Radmer's new theory of liability and was prejudiced thereby. Accordingly, we hold that the trial court committed reversible error in allowing that testimony to come in and remand this case for a new trial.

Id.

The proposition that an improperly disclosed expert will normally be precluded from testifying is repeated in other Idaho cases. *See Edmunds v. Kraner*, *supra* (when plaintiff failed to demonstrate an acceptable reason to extend discovery deadlines, district court did not abuse discretion in excluding testimony; purpose of discovery rules is to facilitate fair and expedient pretrial fact gathering, not encourage conduct inconsistent with that purpose); *see also Zylstra v. State,* 157 Idaho 457, 337 P.3d 616 (2014)(trial court did not err in excluding expert opinions and granting pretrial motion for summary judgment where expert opinions disclosed beyond the discovery deadline); *City of Meridian v. Petra, Inc.*, 154 Idaho 425, 299 P.3d 232 (2013) (court approved the trial court's ruling admitting testimony when it concluded that the testimony offered was fact testimony, not opinion testimony, but hinted that the result might have been different if the lower court allowed expert testimony despite late disclosure); *Aguilar v. Coonrod,* 151 Idaho 642, 262 P.3d 671 (2011)(expert witness disclosures did not comply with requirements of Rule 26 by providing sufficient detail of expert opinions, no error in excluding expert testimony; court noted that "substantial policy consideration underlying the expert witness disclosure requirements . . . is to provide each party with fair notice and an opportunity to

prepare for trial"); *Schmechel v. Dille, M.D.*, 148 Idaho 176, 219 P. 3d 1192 (2009)(information relevant to opinion known sufficiently in advance to allow for disclosure, so expert testimony excluded when not timely disclosed); *City of McCall v. Seubert*, 142 Idaho 580, 130 P.3d 1118 (2006)(prejudice resulting from late disclosure is greater when the witness is an expert); *White v. Mock*, 140 Idaho 882, 104 P.3d 356 (2004)(typically, failure to comply with Rule 26 regarding disclosure of expert testimony results in the exclusion of such testimony); *Bramwell v. South Rigby Canal Co.*, 136 Idaho 648, 39 P. 3d 588 (2001)(no abuse of discretion in excluding expert testimony disclosed 12 days prior to trial when there was no legitimate excuse for the late disclosure).

St. Luke's could not locate ANY Idaho case where there was a disclosure of an expert opinion for the first time DURING TRIAL in violation of a pretrial order, and the trial court admitted the testimony, after acknowledging that the opposing party was prejudiced. *Radmer, supra,* is the most prominent mid-trial situation, and there **this Court reversed and remanded for a new trial.** The same result is compelled in this case.

B. Compounding the Error in Admitting Dr. Wiggins' Undisclosed Opinions, the Trial Court Erred in Allowing another Expert Witness to Express Opinions that were not Properly Disclosed Prior to Trial in Violation of Rule 26 and Pretrial Orders.

Dr. Carl Goldstein was called by the Herretts to testify at the very end of the trial, on the last day, during rebuttal. Tr. pp. 1089-1129. He was the only rebuttal witness. Prior to his testimony, St. Luke's moved for an order excluding the testimony, once again for failure to adequately disclose the expert opinions. R. p. 1150. Despite the fact that the trial court had allowed an undisclosed opinion from Dr. Wiggins, the court stated:

> The Court has held in ruling on the motions *in limine* the week before trial, both parties are required to comply with Rule 26 and that if opinions or the supporting data or other information not, to support those opinions, haven't been disclosed, not coming in, and I've tried to stay there.

Tr. p. 1087, Ll. 7-12. Nevertheless, the court indicated, following an objection from St. Luke's[8] that it needed to hear an offer of proof from the Herretts before determining whether the expected testimony was outside the scope of the pretrial disclosure. Tr. pp. 1100-1101. St. Luke's pointed out that all Dr. Goldstein's disclosure indicated was that he held an opinion that an article Dr. Shankland, the St. Luke's expert, relied upon, was "outdated."

> Here's the problem, Your Honor, as Ms. Fouser pointed out this morning: What he's doing by referring to all of these articles and referring to Dr. Shankland's report, he wants to discredit all of it. That isn't what the disclosure says. The disclosure simply says that some article, some unidentified article is outdated. We don't know which article it is, and we have no idea what his opinion is. He doesn't say that in his disclosure. Obviously Mr. Whitehead is going to---is looking for an opinion from this witness regarding some article. We don't know which one. And we don't know what the opinion is, Your Honor. But we're going to hear it if you allow it.

Tr. p. 1095, Ll. 6-17. During the offer of proof, however, Dr. Goldstein did not testify that an article was "outdated." Instead, he testified that a study referenced in an article that Dr. Shankland had relied upon was not designed to provide the kind of support necessary for Dr. Shankland's opinion on life expectancy. Tr. pp. 1113-1130. The testimony was clearly not in any way related to the prior disclosure, as Dr. Goldstein's criticism of the study is not mentioned in the disclosure. R. p. 955-956.

The trial court once again used the wrong standard in ruling on whether Dr. Goldstein could testify. The court stated:

> So then we're left with the question, well, is it permissible for this witness to come in and opine his disagreement with this report for stated reasons, and that is what the plaintiffs want to do in this case . . . He just disagrees with, based upon the wording of this report. There should be no surprise in this case that this testimony was coming. That's been the whole gist of the issues in this trial. I'm going to allow him to testify over the objection of the defense to

[8] Tr. pp. 1093-1094 (first set of objections).

> the limited extent that you have demonstrated here in this offer of proof.

Tr. p. 1110, Ll. 10-23. So, instead of comparing the offered opinion to the pretrial disclosure, the trial court used some sort of hybrid standard of whether the testimony was relevant to the disputed issues and within the scope of rebuttal. That is clearly the wrong legal standard, and thus an abuse of discretion.[9] See previous section I and authorities cited therein.

Because this testimony was admitted in rebuttal, at the very end of the trial, and St. Luke's was unaware until an offer of proof what the testimony would involve, there was simply no ability to rebut the evidence, and thus St. Luke's was prejudiced by the faulty disclosure. It was error for the court to allow the testimony. This, along with the error noted previously, and based upon the same legal authorities cited there, should mandate reversal for a new trial.

C. The Trial Court Failed, as Matter of Law, to Properly Instruct the Jury on the Correct Legal Definition of Recklessness.

St. Luke's objected to the Herretts' proposed jury instruction on recklessness. The objection noted that recklessness was not appropriate in this case, and that the instruction as submitted was not consistent with Idaho's pattern jury instructions, IDJI 2.25. R. p. 1025. Instead of rejecting the proposed instruction, and using the standard IDJI instruction, the trial court used a modified version of the submitted instruction, which does not set out the complete and proper standard for recklessness.

Our appellate courts discourage trial courts from deviating from the pattern jury instructions unless there is a good reason to do so. This is incorporated into our rules, which set the standard. I.R.C.P. 51. Deviating from the IDJI is allowed only when "a different instruction would more adequately, accurately, or clearly state the law." See *State v. Clay*, 112 Idaho 261,

[9] To preserve the issue for appeal, St. Luke's asked the court to note the objection, and the court responded: "Well, you have preserved about 15 objections....It's pretty obvious the defense has objected to calling this witness at all. I think that preserves your objection. I guess you can talk to the Supreme Court about that someday." Tr. p. 1111, Ll. 12-13, p. 1112, Ll. 15-18.

731 P.2d 804 (Ct. App. 1987); *Schaefer v. Ready*, 134 Idaho 378, 3 P.3d 56 (Ct. App. 2000)(error of law not to use pattern jury instructions). While the standard IDJI jury instruction does not define "recklessness," this Court has approved of the use of IDJI 2.25, the definition of willful and wanton, as a definition of recklessness. *Hennefer v. Blaine County School District #61*, 158 Idaho 242, 346 P. 3d 259 (2015); *Carrillo v. Boise Tire Co.*, 152 Idaho 741, 274 P. 3d 1256 (2012). IDJI 2.25 states:

> **IDJI 2.25 - Definition of "willful and wanton"**
>
> The words "willful and wanton" when used in these instructions and when applied to the allegations in this case, mean more than ordinary negligence. The words mean intentional or **reckless** actions, taken under circumstances where the actor knew or should have known that the actions not only created an unreasonable risk of harm to another, but involved a high degree of probability that such harm would actually result.

The instruction the court actually gave eliminates the words underlined above. Those eliminated words are some of the most critical parts of the definition of recklessness. One of the primary issues in this case, a medical malpractice action, is whether the individual providing the care was or should have been aware that the actions taken created an unreasonable risk of harm to another, with knowledge that there was a high degree of probability that such harm would actually result. The recklessness instruction is particularly critical in a medical malpractice case, where there is risk involved in every invasive medical procedure. Health care providers proceed in the face of such risk. The requirement that there be an "unreasonable risk of harm" is a critical component of the instruction and there was no reason to exclude that element of the recklessness standard.

The court's instruction also included some language that is troubling, given the deletions noted above:

> Conduct is reckless when a person makes a conscious choice as to his or her course of action under circumstances where the person knew or should have known that such action created a high

> probability that harm would actually result. The term "reckless" does not require an intent to cause harm. Reckless means more than ordinary negligence.

R. p. 1177. So the district court eliminated this language from IDJI 2.25:

- "Willful and wanton"
- ...intentional...
- ...not only created an unreasonable risk of harm to another...
- ...degree of...

. . . and included this added language which is not in IDJI 2.25:

- . . . person makes conscious choice as to his or her course of action . . .
- The term "reckless" does not require an intent to cause harm.

The district court did not explain the reasons for deviating from IDJI 2.25 by eliminating some of the language. He merely explained why he had added some of the language to the IDJI. Tr. p. 1144, Ll. 10-14 ("There's nothing wrong with the ICJI (sic) instruction, I just think Hennefer—well, I just think this instruction is better.") It will thus be difficult for the Supreme Court to determine the reasoning behind the trial court's actions. There is no clear indication from this record why the trial court felt that the Herrett's proposed instruction "more adequately, accurately, or clearly state[d] the law" when it eliminated a portion of the definition of recklessness but added other language.

Critical to this argument is the district court decision to eliminate the words "intentional" and "created an unreasonable risk of harm to another" but then add the words "person makes a conscious choice as to his or her course of action" and that reckless "does not require an intent to cause harm." The combination of these deletions and additions could clearly leave the jury with the impression that they need not judge the quality of the risk assumed, and that the Herretts

must simply prove that Nurse Wentz took this action after thinking about what should be done.[10] The description of the type of harm that might have occurred and the intentional nature of the behavior are critical pieces of the definition of recklessness. The Supreme Court has authored many opinions trying to define recklessness, but has made it abundantly clear that this is a critical element. The courts have stated "the type of harm must be manifest or ostensible, and highly likely to occur." *Farnworth v. Ratliff*, 134 Idaho 237, 999 P.2d 892 (2000); *Harris v. State Department of Health and Welfare*, 123 Idaho 295, 847 P.2d 1156 (1992). This description of the type of behavior and the type of harm required is diminished when one piece of those two elements is eliminated. Both elements are critical. The use of the word "and" by the Supreme Court makes that apparent. Use of the word "and" typically means that both elements are required.

In effect, these additions and deletions turned the reckless standard into another form of negligence.

> Reckless misconduct differs from negligence in several important particulars. It differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness or a failure to take precautions to enable the actor to adequately cope with a possible or probable future emergency in that reckless misconduct requires a conscious choice of a course of action either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. It differs not only from the above-mentioned form of negligence, but also from that negligence which consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount that that which is necessary to make his conduct negligent.

Carrillo v. Boise Tire Co., 152 Idaho 741, 751, 274 P.3d 1256, 1266 (2012) (emphasis added),

[10] The Court of Appeals has noted, in one case, that eliminating one of these elements would set a lower standard of proof. *Galloway v. Walker*, 140 Idaho 672, 99 P.3d 625 (Ct. App. 2004). In that case, the element eliminated was the one included in this instruction, but the principle would still apply here.

citing *State v. Papse*, 83 Idaho 358, 362-363, 362 P.2d 1083, 1086 (1961). In this case, the main dispute surrounds Nurse Wentz's "inadvertence, incompetence, unskillfulness or failure to take the precaution" by not laying Mrs. Herrett down, using a procedure she had never done before. Tr. pp. 438, Ll. 4-11. There is no question that Nurse Wentz was unskilled in this procedure. *Id.* The primary issue was that Nurse Wentz failed to take a precaution that would normally reduce (not eliminate) the risk of an air embolism appearing following this procedure. However, the risk of an air embolism, even assuming such precautions were taken, was less than 1% of all procedures such as this. Tr. pp. 542, Ll. 18-25. The precautions which Nurse Wentz failed to take would not have eliminated the risk, but merely reduced it an infinitesimal amount. There is ALWAYS a risk of harm from any invasive medical procedure. While recklessness does not require a malicious intent to harm, it does require knowledge of a high degree of probability that harm will result, and that there is an *unreasonable risk of harm* to the injured person. The instruction here did not account for this circumstance, despite St. Luke's objection to the plaintiffs' proposed instruction.

St. Luke's recognizes that an error in jury instructions is not reversible unless the jury instructions as a whole mislead the jury or prejudice a party. *Ballard v. Kerr, supra.* However, here nearly the whole of this trial focused upon the issues of recklessness and damages. St. Luke's admitted liability for a breach of the standard of care, i.e., negligence in a medical malpractice case. The main focus of the evidence was upon the damages that would result, and the issue of whether Nurse Wentz's conduct was reckless. This was a critical, central instruction. It was the only instruction on the definition of recklessness. If the instruction was not a correct statement of the law, the prejudice is palpable.

The addition of the quoted language and deletion of the other language clearly affected

the jury's decision. During deliberations, the jury indicated a struggle with the definition of recklessness, by submitting this jury question: "Can we get the legal definition of negligence?" R. (Confidential Exhibits) p. 23. The court determined that, at that point, during deliberations, and after closing arguments, it was better not to further instruct the jury, and the parties agreed. The court gave the jury the following admonition: "You have asked whether you can have the legal definition of negligence. The answer is no. You are to decide the case based on the instructions you have been given." R. (Confidential Exhibits) p. 24. The mere submission of this jury question makes it apparent that the jury struggled with the definition of recklessness, and would have benefitted a more accurate definition.

In this case, the instruction submitted by the plaintiff softened the standard, and when that deviation occurs in the context of a medical malpractice case, where there is always a risk of harm, the effect was crucial. The propriety of a jury instruction is a question of law for the Supreme Court, and the Court exercises free review. *Ballard v. Kerr*, 2016 Ida. LEXIS 228, 378 P.3d 464 (2016). St. Luke's strongly believes that this instruction was incorrect as a matter of law, addressed a critical issue in the case, and justifies reversal for a new trial with a proper instruction.

D. The Trial Court Erred in Failing to Exclude Testimony from a Life Care Planning Expert not Supported by Proper Foundation.

During trial, St. Luke's objected many times to the testimony offered by the Herretts' life care planning expert, Ms. Debra DeMint-Lee.[11] See Tr. pp. 660, L. 24-p. 675. L. 9; p. 681, L. 20-p. 682, L. 13. The principal basis for these objections was that Ms. DeMint Lee's estimates of the cost of future medical care for Mrs. Herrett were not based on sufficient foundation, since

[11] See, Tr. p. 660, L. 25; p. 661, Ll. 18-21; p. 667, Ll. 10-13; p. 672, Ll. 15-16; p. 674, Ll. 13-20; p. 675, Ll. 7-9; p. 681, Ll. 20-23; p. 691, Ll. 7-24; p. 696, Ll. 19-21. The trial court sustained many of these objections, without stating a reason, but then allowed testimony to be admitted, despite a lack of foundation, usually after DeMint-Lee indicated she had consulted with a Nurse Deringer.

DeMint-Lee did not speak to any of Mrs. Herrett's treating physicians to obtain competent medical opinions to support her assumptions. Tr. p. 664, Ll. 22-25. In ruling on the objection initially, the trial court once again used an improper legal standard. Instead of focusing upon whether the necessary medical foundation was present, the trial court directed counsel for the Herretts to provide more testimony about DeMint-Lee's own qualifications and education. Tr. p. 661, Ll. 22-24; p. 663, Ll. 17-22 ("I think as it goes to the issue of her qualifications as an expert, I think that's the issue here...") Failure to use the correct legal standard demonstrates an abuse of the court's discretion in the admission of this evidence.

Damages must be proven with "reasonable certainty." *Harris Inc. v. Foxhollow Constr. & Trucking*, 151 Idaho 761, 770, 264 P.3d 400 (2011). "Reasonable certainty" does not mean that damages need to be proven with mathematical exactitude, but it does require a plaintiff to prove that damages are not merely speculative. *Id.*; *Sohn v. Foley*, 125 Idaho 168, 172, 868 P.3d 496 (Ct. App. 1994) (noting that where claimed damages are inherently speculative, they are not recoverable as a matter of law).

In order for a life care plan to be the basis for economic damages, the costs assigned to future care and treatment must be based on medical opinions. *In re Ethicon, Inc.*, 2014 U.S. Dist. LEXIS 15351 (S.D. W. Va. Jan. 15, 2014) (held life care plan must be based on medical foundation); *Hale v. Gannon*, 2012 U.S. Dist. LEXIS 125756 (S.D. Ind. Sept. 5, 2012)(treatment included in a life care plan that is not supported by a doctor's recommendation is not scientifically reliable); *See also Cooper v. Bouchard Transp.*, 140 So. 3d 1, 7 (2013)(ruling that a life care planner may testify as to future medicals when relying on physician reports and consultations); *Saeco Elec. & Util., Ltd. v. Gonzales*, 392 S.W.3d 803, 809 (Tex. App. 2012) (life care planner's testimony sufficient when based on medical examinations, recommended

procedures, and physician evaluations); *Mitchem v. Gabbert*, 31 S.W.3d 538, 543 (Mo. Ct. App. 2000) (life care plan admissible because it was prepared by a doctor; discusses cases lacking physician testimony); *Weiner v. Wisniewski*, 59 Del. 79, 81, 213 A.2d 857, 858 (1965) (future medical needs, "could be proven only through a competent medical witness."); *Bleyer v. Gross*, 19 Wis. 2d 305, 311, 120 N.W.2d 156, 160 (1963) (expert testimony required to prove future medical needs, speaks in terms of physicians).

A life care planner must rely on the opinions of appropriately credentialed individuals to predict what types of future treatment will be necessary, and how long that treatment will be required. In many cases, this requires testimony from treating physicians, because they are the individuals who have examined the plaintiff and made an individualized diagnosis and assessment as to the needs of the plaintiff and appropriate future treatment. In some situations, this type of foundation can come from an independent medical examination (IME) by a retained medical expert. Courts have excluded life care planning expert testimony, even from nurses, where they failed to interview the plaintiff's treating physicians to obtain the necessary medical foundation. *Lologo v. Wal-Mart Stores, Inc.*, 2016 U.S. Dist. LEXIS 100559 (D. Nev. 2016). *See also Hogland v. Town & Country Grocer of Fredricktown Mo., Inc.,* 2015 U.S. Dist. LEXIS 80493 (E.D. Ark. 2015)(life care planners qualified to offer opinions so long as they rely upon the opinions of other experts for items that are outside their own fields of expertise); *Norwest Bank, N.A. v. Kmart Corp.*, 1997 U.S. Dist. LEXIS 3426 (N.D. Ind. 1997)(unpublished)(life care planners can testify as to costs for various treatments, but the need for treatment must be established by medical evidence, and life care planner was not qualified to provide the medical evidence).

Nursing expertise is not sufficient for diagnosing and prescribing treatment, and allowing

a nurse to offer such medical opinions would be similar to having a lay person offer opinions regarding diagnosis and treatment, which this Court has clearly forbidden.[12] *Evans v. Twin Falls County*, 118 Idaho 210, 796 P.2d 87 (1990)(lay opinion is inadmissible to prove medical causation); *see also Lumbermens Mutual Casualty Co. v. Egbert*, 125 Idaho 678, 680-681, 873 P.2d 1332, 1334-35 (1994)(claims supervisor made an assumption about total disability in calculating future liability, but was not qualified to do so, and "such a determination must be established through competent medical testimony."); *Ryan v. Besiner*, 123 Idaho 42, 844 P.2d 24 (Ct. App. 1992); *Donaldson v. Ryder Truck Rental & Leasing*, 737 N.Y.S.2d 783, 189 Misc.2d 750 (2001) (vocational rehabilitation specialist's future medical cost projections were found clearly speculative because the treating orthopedic surgeon's affidavit did not address the need for future medical procedures and their costs).

Based on all of these legal authorities, to provide foundation for a life care plan, there must be sufficient evidence about the "appropriately credentialed individuals" before their opinions can be admitted. Future medical care costs are one of the primary opinion-driven variables in a life care plan's cost analysis, and all future medical treatment, including start dates, frequencies and durations, must be supported by sound medical reasoning, and to a reasonable degree of medical certainty. Future medical requirements must be based on medical opinions regarding medical necessity for the particular plaintiff, and must therefore be formulated by a qualified medical professional who has examined the plaintiff with his or her own functional limitations.

This type of medical foundation is even more critical in this case, where the vast majority of the disputed future care may stem from Mrs. Herrett's prior and subsequent medical

[12] The trial court previously granted a motion *in limine* seeking to exclude lay testimony regarding medical causation, saying. "it is improper to have the plaintiff or lay witnesses testify about medical causation issues." Tr. p. 38, Ll. 15-17.

conditions. If she should become more debilitated in the future, requiring medical care, would those costs be proximately related to her stroke, or to renal failure, heart attacks, or to the likelihood of future strokes (given that she had a stroke prior to this one)? Only a medical professional could opine on these issues, and provide the necessary foundation for Ms. DeMint-Lee's opinion.

Ms. DeMint-Lee testified that she did not consult with any physician to obtain the essential medical underpinning, and testified that she did not speak to any of Mrs. Herrett's treating providers. Tr. p. 664, ll. 22-24; p. 707, Ll. 2-10. Ms. DeMint-Lee testified that she did not consult with Dr. Narasimhan or Dr. Laucius, two of Mrs. Herrett's treating providers. Tr. p. 664, Ll. 22-25. DeMint-Lee also acknowledged that many of her opinions, for example, her opinion regarding the need for 24 hour care for Mrs. Herrett's lifetime, were not supported by the medical records of Mrs. Herrett's treating physicians. Tr. pp. 710, L. 9- 711, L. 21.

Ms. DeMint-Lee also testified that she consulted with a nurse practitioner, a Ms. Deringer. There was no testimony or evidence as to Ms. Deringer's credentials, only that she was a nurse practitioner who worked with the V.A. Tr. p. 669.[13] DeMint-Lee confirmed that Ms. Deringer is not a doctor, Tr. p. 706, Ll. 1-2, she did not have a copy of Deringer's CV in her file, Tr. p. 705, Ll. 23-25, did not speak with or examine Mrs. Herrett, nor was she responsible for providing any care for Mrs. Herrett. Tr. p. 705, Ll. 17-19; p. 706, Ll. 12-19. Ms. Deringer resides in Arizona, and thus could not speak to the standards for future medical care in Idaho. Thus, to the extent a nurse practitioner may be qualified to provide the medical foundation for a life care plan (a proposition St. Luke's disputes), she could not do so here. Since Ms. Deringer had never met or examined Mrs. Herrett, any opinions she provided to Ms. DeMint-Lee (whatever they

[13] Ms. DeMint-Lee testified that it was her understanding that as a nurse practitioner, Ms. Deringer can assess and treat patients, but no testimony was presented that Ms. Deringer had ever diagnosed, assessed and treated Mrs. Herrett. Tr., p. 670, Ll. 3-11.

were) would be speculative and could not form a legally sufficient basis for Ms. DeMint-Lee to opine on Mrs. Herrett's future medical needs. See *State Farm Mut. Auto. Ins. Co. v. Long*, 189 So. 3d 335, 338-39 (Fla. Dist. Ct. App. 2016) (physician's assistant cannot testify as to future meds, because only a doctor can decide what future medical treatment is necessary).[14]

Where a claim is asserted for the recovery of future benefits, the burden of proof is on Plaintiffs to prove with reasonable certainty the amount of loss caused by the conduct of the defendant. *Griffen v. Clear Lakes Trout Co.*, 143 Idaho 733, 152 P.3d 604 (2007). Plaintiffs bear the burden of proving not only the right to damages, but also the fact and amount of damages. *Id.* In seeking recovery for future medical expenses, competent evidence must be introduced to prove the damages. The award must not be based on conjecture or speculation. *Bailey v. Sanford*, 139 Idaho 744, 86 P.3d 458 (2004).

Since Mrs. Herrett's life care plan lacked the essential foundation (medical opinions from treating physicians on future care requirements, life expectancy and costing) that would make it admissible at trial, it should have been excluded. The record does not provide a clear explanation from the trial court at the time objections were made. However, St. Luke's moved for a directed verdict on future economic damages based on this lack of foundation. In denying the directed verdict, the court stated:

> With regard to the medical foundation issue, I would agree that in the normal type of case that you would certainly need medical opinion to support a life care planner's ultimate conclusions. Normally. This case is not the normal case. I think that if all we had in this case was Mr. Herrett's testimony that "I've lived with my wife for 32 years. I know what she can do, what she couldn't do before this stroke, and she can't be left alone because she does

[14] Ms. DeMint-Lee also testified that she consulted with Dr. Calhoun, a neuropsychologist, to obtain some "medical" foundation. Dr. Calhoun is not a medical doctor. Tr. p. 708, Ll. 13-16.The trial court did not make this distinction in ruling on a motion in *limine* prior to trial, when the court failed to understand that Dr. Calhoun's testimony would not provide sufficient medical foundation. R. p. 1019. The mere fact that an individual has the title "Dr." does not mean they are competent to testify or provide foundation for future medical care.

> strange things, she needs help bathing, she has problems with her ostomy bags, she can't cook, I mean, frankly, that is enough, in and of itself to submit a—to make the argument, support the argument that she needs extended life care assistance. Now, whether that's credible to this jury or not, whether it's all necessary, again, is a factual question, but to say that there's no evidence to support that, I just don't agree with that.

Tr. p. 814, L. 16-p. 815, L. 5. This statement by the trial court clearly indicates an abuse of discretion, because the trial court used the wrong legal standard to assess the admissibility of this evidence. This Court has made it clear that lay testimony cannot be used to opine on medical causation issues. The critical point here is whether any future care for Mrs. Herrett stemmed from the stroke she suffered, or because of her many other medical conditions which also contributed to her future care needs. Clearly, allowing Mr. Herrett to provide the foundation for future care would be in error. *Evans v. Twin Falls County*, 118 Idaho 210, 796 P.2d 87 (1990)(lay opinion is inadmissible to prove medical causation). Allowing the testimony on this basis was an abuse of discretion.

The trial court thus abused its discretion because the court did not indicate what standard it would use to assess the discretionary admission of such evidence. *Lamar Corp. v. City of Twin Falls*, 133 Idaho 36, 981 P.2d 1146 (1999). Since the jury awarded the Herretts $1.4 million dollars in future medical care costs, based solely on this life care plan, the admission of the testimony was extremely prejudicial, affected a substantial right of St. Luke's, *Burgess v. Salmon River Canal Co.*, 127 Idaho 565, 903 P.2d 730 (1995) and requires reversal for a new trial or remittitur of the economic damages award.

V. CONCLUSION

Preservation of the adversary process in civil proceedings requires that parties be given an adequate opportunity to understand their opponent's evidence, to be able to adequately respond. This requires that expert testimony be adequately disclosed prior to trial. In two critical

instances, that pretrial disclosure did not happen here. Along with an error in instructing the jury, and allowing testimony about future medical costs without foundation, the errors that occurred in the lower court cry out for the only just response: a new trial with a fair opportunity to prepare, proper jury instructions, and properly supported expert opinions. St. Luke's requests that the Court reverse the lower court rulings, and remand this case to the lower court for a fair trial.

DATED this 21 day of March, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21 day of March, 2017, a true and correct copy of the foregoing was served on the following by the manner indicated:

Kenneth L. Pederson	☑	U.S. Mail
Jarom A. Whitehead	☐	Hand-Delivery
Pederson and Whitehead	☐	Overnight Delivery
P.O. Box 2349	☐	Facsimile – (208) 734-2772
Twin Falls, Idaho 83303-2349	☑	Electronic Transmission (File & Serve system)

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