5-16-2017

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

IN THE SUPREME COURT FOR THE STATE OF IDAHO

RODNEY HERRETT AND JOYCE HERRETT, as husband and wife, Plaintiffs/Respondents, vs. ST. LUKE'S MAGIC VALLEY REGIONAL MEDICAL CENTER, LTD, doing business as ST. LUKE'S MAGIC VALLEY, Defendants/Appellants, and BUSINESS ENTITIES I through X, and JOHN DOE and JANE DOE, husband and wife, I through X, Defendants.	Case No. CV-2015-573 Supreme Court No. 444567

RESPONDENTS' BRIEF

Appeal from the District Court of the Fifth Judicial District for Twin Falls County

Honorable Randy J. Stoker, District Judge, presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case

This case involves allegations of medical practice against Defendant St. Luke's Magic Valley Regional Medical Center, Ltd. (hereinafter, "St. Luke's"). St. Luke's admitted negligence and causation prior to trial. The issues at trial were recklessness and damages. There is no dispute in this case that Mrs. Herrett's injuries as a result of the stroke were debilitating such that she needs at least 12 hours a day in-home care for the rest of her life.

B. Statement of Facts

Mr. Rodney Herrett and Mrs. Joyce Herrett (collectively, "the Herretts") were married in 1984. Tr. p. 226, LL. 21-25. Together they raised a family of eight children. Tr. p. 227, LL. 1-4. They also have fifteen grandchildren and two great-grandchildren. Tr. p. 227, LL. 5-7.

Due to previous cervical cancer and radiation treatments, Mrs. Herrett lost her bladder, colon, and uterus. Tr. p. 411, LL. 14-24. As a result, she had an ileostomy and a urostomy for more than 20 years prior to the stroke. Tr. p. 372, LL. 3-6; p. 412, LL. 5-17. Up until she suffered the stroke at St. Luke's she could independently and privately care for and maintain her ostomies without the assistance of others. Tr. p. 412, LL. 19-25.

Despite her ostomies and other conditions, Mrs. Herrett was able to lead an independent and family-oriented life. Tr. p. 370, LL. 1-25. She worked and drove a car. Tr. p. 371, LL. 19-22. She was known to be a voracious reader. Tr. p. 371, LL. 1-5. She and her husband enjoyed camping and traveling. Tr. p. 371, LL. 13-25; p. 372, LL. 1-2. She regularly babysat her grandchildren without assistance from others. Tr. p. 371, LL 15-18. In fact, Mrs. Herrett was able to care for her 18-month old granddaughter for four to six hours a day prior to this stroke. Tr. p. 329, LL. 2-8.

In December 2013, Mrs. Herrett was admitted to St. Luke's Magic Valley due to infection

and sepsis. Tr. p. 230, LL. 17-20. On December 24, 2013, Mrs. Herrett had nearly completely recovered and was to be discharged home. Tr. p. 230, L. 23 – p. 231, L. 3.

At the time of discharge from St. Luke's Magic Valley, Mrs. Herrett was dressed, had her coat on, and was sitting in a wheelchair ready to leave the hospital. *Id.* Mrs. Herrett, however, still had a central venous catheter ("CVC") placed in her neck at this time. Tr. p. 231, LL. 5-11. The central venous catheter had been inserted into Mrs. Herrett's jugular vein and sutured to the skin of her neck. Tr. p. 506, LL. 10-25.

Mr. Herrett informed Nurse Wentz that the CVC was still in place. Tr. p. 231, LL. 5-11. She left the room and called Mrs. Herrett's physician, Dr. Kim Cheri Wiggins (hereinafter, "Dr. Wiggins") for direction. Tr. p. 437, LL. 8-17. Dr. Wiggins ordered that the central venous catheter be removed prior to discharge. Tr. p. 437, LL. 18-20.

Nurse Wentz had never removed a CVC prior to this date. Tr. p. 438, LL. 9-12. She testified that she informed a co-worker, Nurse Sheila Dutt, that she had never performed this procedure and asked for assistance. Tr. p. 439, LL. 11-17. Nurse Wentz stated that Nurse Dutt stated, "just go ahead and pull it out slowly." Tr. p. 439, LL. 23-24. Nurse Dutt denied that Nurse Wentz asked for assistance. Tr. p. 493, LL. 14-19.

St. Luke's had a policy for removing a CVC. Exh. FF. Nurse Wentz was aware of the policy but had never reviewed it. Tr. p. 440, LL. 10-24. Removing a CVC is a known high risk procedure that can cause an air embolism or stroke if done improperly. Tr. p. 488, LL. 1-9.

There is no dispute that Nurse Wentz violated the hospital policy when she attempted to remove the CVC while Mrs. Herrett was sitting up.[1] Tr. p. 232, LL. 12-13. As the central line was removed, Mrs. Herrett became very anxious and began having difficulty breathing. Tr. p. 232, LL. 19-24. She then started to convulse as her eyes rolled back into her head. Tr. p. 233, LL.

[1] The proper procedure involved laying the patient flat and instructing them to hold their breath.

7-10. Mrs. Herrett became totally unresponsive and a rapid response team was called. Tr. p. 233, LL. 10-25. A CT scan was performed that confirmed Mrs. Herrett had suffered a stroke caused by an air embolism. Tr. p. 587, L. 23 – p. 588, L. 3.

As a result of the stroke, Mrs. Herrett suffered severe physical and mental damage. Tr. p. 589, LL. 1-19. She was densely hemiparetic and extremely weak on her right side. *Id.* Mrs. Herrett also had severe expressive aphasia and difficulty swallowing. *Id.* Additionally, Mrs. Herrett developed nearly crippling anxiety. *Id.*

Mrs. Herrett was hospitalized as a result of the stroke. Tr. p. 588, LL. 16-19; Tr. p. 589, LL. 7 – p. 590, L. 2. She had to re-learn the alphabet. Tr. p. 918, LL. 19-21. She had to learn how to walk again. Tr. p. 919, LL. 2-3. She had to re-learn to swallow. Tr. p. 918, LL. 24-25. Mrs. Herrett continued to see Dr. Wiggins on an outpatient basis as she continued her therapies. Tr. p. 590, LL. 15 – p. 591, LL. 1.

On June 29, 2014, Mrs. Herrett was examined by neuropsychologist Dr. Calhoun. Tr. p. 332, LL. 3-22. Dr. Calhoun works at St. Alphonsus Regional Medical Center as the director of brain injury and stroke rehabilitation. *Id.* Dr. Calhoun diagnosed Mrs. Herrett with moderate expressive language dysfunction inhibiting her ability to concentrate and keep her attention. Tr. p. 339, LL. 15-24. Also, she had moderate expressive aphasias as well as dysarthric ("slurred") speech. Tr. p. 341, LL. 17-22. Significantly, Mrs. Herrett was suffering from anxiety related to the stroke. Tr. p. 341, LL. 23-25. Dr. Calhoun attributed this to her loss of brain function, her inability to function independently, and inability to care for herself. Tr. p. 342, LL. 13-19.

With respect to Mrs. Herrett's activities of daily living ("ADLs") such as the ability to get up, brush her teeth, shower, and eat, Dr. Calhoun found that Mrs. Herrett required ongoing assistance. Tr. p. 345, LL. 21 – p. 346, LL. 1-8. With respect to her ostomies, Dr. Calhoun recommended she have 24 hour assistance Tr. p. 347, LL. 11 – p. 348, LL. 14; Exh. 37; 38.

In the fall of 2014, Mrs. Herrett was readmitted to the hospital. Tr. p. 591, LL. 2-14. Mrs. Herrett was suffering from dehydration and severe anxiety. Tr. p. 591, LL. 19-25. She also had weight loss, functional decline and poor intake. Tr. p. 594, LL. 19-25. She has permanent contractures of her right arm and wrist. Tr. p. 665, L. 20 – p. 666, L. 10. Her gait is unsteady, placing her at a high fall risk. *Id.* She has difficulty in activities of daily living such as showering, dressing and grooming. *Id.* Mrs. Herrett also suffered vision changes, including double-vision, as a result of the stroke. Tr. p. 673, LL. 11-16. She continues to suffer from agitation, irritability, depression and anxiety as a result of the stroke. Tr. p. 679, LL. 21 – p. 680, LL. 11. She can no longer drive. Tr. p. 249, LL. 2-7.

As a result of the stroke, Mrs. Herrett also lost the ability to care independently for her ostomies. She lost physical sensation allowing her to detect when her ileostomy and urostomy where filling or full. *Id.*; Tr. p. 413, LL. 8-17. Due to the contractures of her arm and wrist and cognitive deficits, she is now unable to empty those bags independently. *Id.*

Mrs. Herrett cannot be left home alone for any significant amount of time. Tr. p. 690, LL. 17 – p. 691, LL. 6; Tr. p. 237, LL. 8-16. Given the severity of her cognitive and physical problems and inability to be independent, Mrs. Herrett requires in-home care. Tr. p. 692, LL. 2-18.

Much of the responsibility of caring for Mrs. Herrett, fell to her husband after the stroke. Tr. p. 237, LL. 17-20. Mr. Herrett helps change, maintain, and empty her ostomies. Tr. p. 237, LL. 17-20. The ostomy bags are typically emptied every hour to hour and a half. Tr. p., 244, LL. 14-16. The bags and wafers also have to be regularly changed. Tr. p. 243, LL. 1-8.

C. Course of Proceedings

On February 9, 2015, Mr. and Mrs. Herrett filed a Complaint against St. Luke's for medical negligence. R. pp. 16-22. Prior to trial, St. Luke's admitted that the manner in which the

central venous catheter was removed violated the standard of care. R. pp. 392; 648; 998; 1175. St. Luke's further admitted that the breach of the standard of care caused Mrs. Herrett to suffer the stroke. *Id.*

The jury trial in this matter began on June 27, 2016. R. p. 1187. The issues in dispute at trial were whether the conduct of Nurse Wentz was reckless, whether the September/October 2014 admission was related to the stroke, and the amount of damages the Herretts were entitled to as a result of the conduct of St. Luke's. App. Brief, p. 5. The Herretts' nursing expert testified at trial that the conduct of St. Luke's was reckless. Tr. p. 520, LL. 1-16. St. Luke's, on the other hand, did not elicit testimony from any witness at trial that Nurse Wentz's conduct was not reckless—not even from Nurse Wentz herself. Tr. p. 493, LL. 3-13. In fact, St. Luke's employee Nurse Dutt testified that she would have expected a nurse who is unfamiliar with a procedure to review the policy before attempting it. Nurse Dutt agreed that it would have been "unthinkable" to allow a nurse who asked for help in removing a central venous catheter to attempt the procedure without the requested assistance. Tr. p. 494, LL. 3-7.

Regarding the September/October 2014 admission to the hospital, Mrs. Herrett's treating physician Dr. Wiggins testified that the stroke was a substantial contributing factor to that admission. Tr. p. 598, LL. 7-19. Dr. Wiggins practiced at St. Luke's Magic Valley as a physiatrist specializing in rehabilitation of patients who have suffered problems such as brain injuries, spinal cord injuries and strokes. Tr. p. 576, LL. 10 – p. 578, LL. 21.

St. Luke's does not deny that the remaining $327,520.47 in medical bills were related to the stroke. The Herretts provided substantial evidence that Mrs. Herrett was entitled to in-home care twenty four hours a day, seven days a week. Tr. p. 692, LL. 7-18. The Herretts' life care planner opined that the in-home care would cost $377.50 per day or about $15.73 per hour. Tr. p. 694, LL. 4-12.

St. Luke's does not dispute that Mrs. Herrett requires a certain level of in-home care. An expert witness for St. Luke's, Dr. Rodde Cox, testified he believed that Mrs. Herrett required care for twelve hours a day, seven days a week. Tr. p. 893, LL. 19-25; p. 894, LL. 1-14. The costing expert for St. Luke's, Ms. Dunlap, valued that care at $18.00 an hour. Tr. p. 1054, LL. 5-12.

For life expectancy and duration of the plan, Ms. Dunlap testified that she utilized Dr. Cox's report for medical foundation. Tr. p. 1057, LL. 2-10. After the stroke, Dr. Cox indicated in his report that he felt "her life expectancy would be roughly 10 years or less." Tr. p. 1057, L. 16 – p. 1058, L. 1. Dr. Cox opined that, prior to the stroke, Mrs. Herrett's life expectancy was 10 -15 years. *Id.* In other words, St. Luke's own expert believed that the stroke cost Mrs. Herrett roughly five years of life. *Id.* Despite these opinions, Ms. Dunlap indicated that she "was asked to use five years" for the duration of her costing analysis even before Dr. Cox's report was finished. Tr. p. 1058, LL. 4-15.

At the conclusion of the trial, the jury returned a verdict finding that the conduct in question was reckless, that the stroke was a substantial contributing factor in the September 2014 admission, and that Herretts were entitled to $3,850,004.83 in total damages. R. pp. 1160-1169. That award consisted of $94,484.86 for the disputed September 2014 admission; $1,400,000 of future medical expenses and in-home care; $178,000 for home modifications; $1,500,000 in non-economic damages to Plaintiff Joyce Herrett; and $350,000 in non-economic damages to Plaintiff Rodney Herrett. R. pp. 1160-1169. The verdict was reduced by stipulation to reflect contractual adjustments of medical expenses and an amended judgment was entered for $3,775,864.21. R. p. 319. St. Luke's then initiated this appeal. R. pp. 1201-1206.

II. ISSUES PRESENTED ON APPEAL

The Herretts Rephrase the Issues on Appeal as:

A. Did the Trial Court abuse its discretion by overruling St. Luke's objection to Dr.

Wiggins' testimony where she was disclosed as a treating physician, the encephalomalacia diagnosis was contained in the medical records introduced into evidence by St. Luke's, and the issue was first raised during cross-examination?

B. Did the Trial Court abuse its discretion in denying St. Luke's Motion for Mistrial where it found encephalomalacia had been properly disclosed and to the extent the jury might have misunderstood the testimony to mean Mrs. Herrett had a "continuing" or ongoing stroke, St. Luke's was allowed to rebut that misunderstanding with its own physician expert and also stipulated to instruct the jury that it is a fact that Mrs. Herrett does not have continuing brain deterioration?

C. Did the Trial Court abuse its discretion by allowing the Herretts' expert witness to testify in rebuttal about a learned treatise that St. Luke's expert discussed on direct testimony after hearing an offer of proof and limiting the testimony?

D. Did the reckless instruction given by the Trial Court correctly set forth the law under the circumstances of this case where it followed the objective standard set forth in *Hennefer* and St. Luke's stipulated to not instructing the jury on negligence?

E. Did the Trial Court abuse its discretion by allowing the Herretts' life care expert to testify after she provided significant foundation with respect to her training as a registered nurse, manager of the VA rehab clinic, educational qualifications, review of the medical records, discussion with a treating physician and in-home evaluation of the Herretts?

F. Did the admission of any of the evidence complained about on appeal violate a significant right of St. Luke's given the undisputed facts of this case or does it constitute harmless error?

G. Should this Court award fees and costs under I.C. § 12-121 because St. Luke's appeal is frivolous, unreasonable and without foundation?

III. ARGUMENT

A. Summary of Argument

This is a lawsuit by a patient who complains that a nurse at St. Luke's hospital recklessly caused a stroke and resulting permanent brain damage by removing a central venous catheter (CVC). The nurse had never performed a CVC removal before, didn't bother to read the hospital protocol that outlined safety precautions that must be taken, knew she could cause a stroke or even death, but did it anyway without following the protocol or obtaining help. There was conflicting testimony by St. Luke's nurses on whether help was asked for and refused. St. Luke's

admitted that the nurse breached the applicable standard of care, but denied that the conduct constituted recklessness. St. Luke's also admitted that the breach of the standard of care by the nurse caused a catastrophic stroke and that the injury was permanently disabling.

At trial there was no dispute that the stroke required months of rehabilitation and hospitalization costing $327,248.07. Tr. p. 254, LL. 17-18; Exh. 100. There was no dispute that Mrs. Herrett needs in-home care for the rest of her life for at least 12 hours a day. The proof was undisputed that, due to the stroke, Mrs. Herrett cannot read any more, cannot be left alone, cannot drive a car, has difficulty remembering things and speaking, and is permanently paralyzed on the upper part of her body.

Not surprisingly, after hearing all of this the jury found the conduct of the nurse was reckless and awarded the Herretts a total of $3,850,004.83 in total damages. R. pp. 1160-1169.

St. Luke's appeals this verdict on four grounds - none of which have any merit. St. Luke's argues that the Trial Court should have granted a mistrial because a treating doctor was allowed to testify about previously undisclosed details of the stroke injury. The opinions regarding the details of the injury, encephalomalacia, were introduced into evidence by St. Luke's during cross examination of the treating physician. St. Luke's opened the door by putting into evidence these medical records and drawing attention on cross examination to only part of them. The Trial Court used its sound discretion in allowing the witness to fully explain her answers on re-direct examination pursuant to Idaho rules. Furthermore, any prejudice was cured when the parties stipulated to an instruction to the jury on that issue.

St. Luke's contends that an expert witness's opinions on rebuttal regarding life expectancy were not properly disclosed. In fact, a detailed disclosure was given by the Plaintiffs and the testimony on rebuttal was very limited and was heard by the trial judge outside the presence of the jury before it was put into evidence. The opinions of Dr. Goldstein could not

have been a surprise to St. Luke's and St. Luke's fails to point to any prejudice or violation of a substantial right due to the admission of the evidence.

St. Luke's claims reversible error because of the jury instruction on the definition of reckless misconduct on the grounds that the instruction is not identical to the IDJI instruction. The instruction as given is a correct statement of the law and conforms to recent Idaho case law. Regardless, the evidence of recklessness is overwhelming and St. Luke's again fails to demonstrate any prejudice given that a contrary finding could not possibly be supported by substantial evidence.

Finally, St. Luke's argues that it is entitled to a new trial because the Herretts' life care planner did not have the proper foundation for her opinions on future care. St. Luke's fails to identify what part of the opinion lacks the requisite medical foundation, ignores the substantial qualifications of the expert witness and ignores the mountain of undisputed evidence regarding the need for future care. These evidentiary rulings and the denial of the motion for mistrial were matters determined in the exercise of discretion by the Trial Court. This is a frivolous appeal, and the Herretts are entitled to attorney's fees.

B. **The Trial Court properly denied St. Luke's Motion for Mistrial based on the applicable legal standards, the underlying facts, and applying reason**

This issue on appeal raises the question of whether or not the lower Court acted within its discretion when it denied St. Luke's motion for a mistrial. Despite repeated arguments to the contrary, the trial judge demonstrably understood the correct legal standards to be applied and used reason to conclude that St. Luke's could receive a fair trial. In its brief, St. Luke's repeatedly mischaracterizes the evidence and record below, demonstrates absolutely no prejudice or that a substantial right was violated, and does nothing more than ask this Court to second guess the Trial Court's discretionary decision.

1. The standard of review is abuse of discretion

Idaho Rule of Civil Procedure 47(u) governs the consideration of motions for mistrial and states as follows "*Declaration of mistrial – Sanctions.* After trial is commenced, at any time prior to the rendering of a verdict, the court on its own motion or upon motion of any party may declare a mistrial if it determines an occurrence at trial has prevented a fair trial." I.R.C.P. 47(u).

The decision to grant a mistrial is left to the sound discretion of the trial court and "[t]he burden is on the person asserting error to show an abuse of discretion." *Ballard v. Kerr*, 160 Idaho 674, 697, 378 P.3d 464, 487 (2016), *citing Merrill v. Gibson*, 139 Idaho 840, 843, 87 P.3d 949, 952 (2004). "When determining whether a district court abused its discretion, this Court considers three factors: (1) whether the trial court correctly perceived the issue as one of discretion, (2) whether it acted within the boundaries of its discretion and consistently with applicable legal principles, and (3) whether it reached its decision through an exercise of reason." *Edmunds v. Kraner*, 142 Idaho 867, 873, 136 P.3d 338, 344 (2006), *citing Lamar Corp. v. City of Twin Falls,* 133 Idaho 36, 40, 981 P.2d 1146, 1150 (1999).

2. St. Luke's fails to demonstrate that it was deprived of a fair trial in this case because of the Court's refusal to grant a mistrial

a. The Court correctly allowed Dr. Wiggins' redirect testimony regarding encephalomalacia given the narrow issue of relatedness of St. Luke's bills to the Herretts for the September 2014 hospital admission

Dr. Wiggins was a St. Luke's employee who treated Mrs. Herrett. She disclosed was disclosed as a treating physician who would testify consistent with the medical records and her treatment pursuant to I.R.C.P. 26(b)(4)(A)(ii). This disclosure specifically included the fact that she was 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." R. p. 66.

At trial, the issues had been significantly narrowed and included whether $94,484.36 in expenses related to the post-stroke treatment and rehabilitation at St. Lukes in September 2014 was caused by the stroke. The Herretts maintain that even a cursory review of the medical records from the September hospitalization made it evident that the hospital admission was related to the stroke event. Also, there is no dispute in this case that all of the medical records from St. Luke's, including those specifically prepared by Dr. Wiggins, were in the possession of St. Luke's long before the trial began in 2016.

Dr. Wiggins was called to testify during the Herrett's case in chief. The primary focus of her testimony on direct was whether her decision to admit Joyce Herrett to St. Luke's in September of 2014 was related to the stroke she suffered in December 2013 – as reflected in her notes. During her direct examination, Dr. Wiggins reviewed the medical records from her treatment of Joyce Herrett in September and, citing the 'chief complaint' documented in the record, definitively linked the need for the hospital admission to the stroke. Tr. p. 595, LL. 14 – p. 596, LL. 5.

This testimony was not objected to during the course of the proceedings below and, as St. Luke's points out in its appeal, no mention was made of encephalomalacia.

b. St. Luke's attempted to put its damages defense on through cross-examination of its own treating physician, and it backfired

St. Luke's counsel cross-examined Dr. Wiggins on a myriad of subjects including other diagnoses or conditions notated in the hospital records that were potentially not related to the stroke. Tr. pp. 626, LL. 4-24. During this cross examination, St. Luke's introduced several exhibits into the record including Defendant's L and K. Tr. p. 622, LL. 10-20. St. Luke's, by its own admission, sought to use the records in conjunction with Dr. Wiggins' testimony to try and convince the jury that some unrelated medical condition of Mrs. Herrett precipitated the need to be hospitalized rather than the stroke. App. Brief, p. 14.

St. Luke's, at its peril, sought to cherry-pick the medical records to get Dr. Wiggins to agree that the stroke St. Luke's caused was not a substantial contributing factor to her hospitalization in September 2014. In short, St. Luke's attempted to put on their defense regarding these damages by cross examining one of their own treating physicians – and it backfired.

On redirect examination, counsel for the Herretts asked about imaging studies that were reviewed by Dr. Wiggins. Tr. p. 627, LL. 22 – p. 628, LL. 2. Dr. Wiggins used the word "encephalomalacia" when discussing the CT findings at the site of the stroke. Tr. p. 628, LL. 3-4. Dr. Wiggins explained that encephalomalacia is the "softening of the brain tissue" that typically happens in the area of the brain that has been damaged. Tr. p. 628, LL. 10-12. St. Luke's objected to this testimony arguing that encephalomalacia was undisclosed. Tr. p. 628, LL. 13-15.

The Trial Court heard argument outside the presence of the jury and, after considering the issue, allowed the witness to testify holding that encephalomalacia had been properly disclosed. Tr. p. 633, LL. 25 – p. 634, LL. 1-14. Specifically, the Trial Court found that the offered testimony was consistent with the medical records. The Trial Court recognized that Dr. Wiggins was a treating physician pursuant to I.R.C.P. 26(b)(4)(A)(ii)[2] and stated:

> Obviously we have a huge amount of medical records in this case. Also very obvious to the Court that these records have been dissected, redissected, and redissected by everybody, and it's what the examination has shown the witnesses so far. So the statement made by Dr. Wiggins about this EKG is in this record. There's no dispute about that. That's been disclosed. I'm going to find within my discretion that this is properly disclosed....

[2] That Rule sets forth the requirement that a disclosure of a non-retained expert requires "a statement of the subject matter in which the witness is expected to present evidence" ... "and a summary of the facts and opinions to which the witness is expected to testify."

Tr. p. 634, LL. 3-14.

Not until the Trial Court ruled in their favor on this issue did the Herretts continue with redirect examination. On appeal, St. Lukes argues that the Trial Court found that counsel for the Herretts "violated" the Court's Order *in limine* with respect to pretrial expert disclosures. App. Brief, p. 10. There is no basis to justify the argument that the Court found that the Herretts violated any Court orders or discovery rules in the record.

The Court allowed the witness to proceed after specifically pointing out that the encephalomalacia was already in the record and had been properly disclosed under 26(b)(4)(A)(ii). Continued colloquy with Dr. Wiggins was concluded and the Court made the following additions to the record after the jury was excused and specifically addressed whether he thought there was any prejudice to St. Luke's as a result:

> I want to make -- supplement this record as to my ruling as to the reason for allowing testimony concerning the EKG and the brain softening Dr. Wiggins testified about. I understand the argument that there is no clear statement in that this opinion was disclosed in terms of the disclosure statements that are filed. I understand that. ***I do not see that that revelation of information to the jury is prejudicial in this case***, and the reason for that is this: There is no question -- there is no question in this case that Mrs. Herrett had a stroke. I'm not, certainly, an expert on brain injuries, but my common sense, education, and knowledge of this whole area is that's exactly what you would expect to see, some deterioration of the brain, from a physical standpoint. That's what strokes do. I can't say that would be surprising to anybody to see that.

Tr. p. 643, LL. 24-25; p. 644, LL. 1-16 (emphasis added). There is nothing in this statement by the Court that indicates it misunderstood the legal standards to be applied with respect to the admission of the testimony – just the opposite.

c. The Trial Court correctly refused to grant a mistrial because St. Luke's did not demonstrate that it could not get a fair trial because Dr. Wiggins' brought up the undisputed diagnosis of encephalomalacia

On July 5, 2016, St. Luke's brought a Motion for Mistrial based on the prior admission of

Dr. Wiggins' testimony regarding encephalomalacia during trial on July 1. Tr. p. 772, LL. 9-18. St. Luke's argues on appeal that the Trial Court applied an incorrect legal standard when considering the motion for mistrial.[3]

During the hearing on the motion, the Trial Court stated: "A motion for mistrial is a discretionary call on the part of the Court. I don't think there is really any dispute as to the law with regard to mistrial motion, as cited in both of the briefs." Tr. p. 79, LL. 11-14. After quoting the Rule 47, the court went on to say:

> So that is the standard that I have to operate with. As I said, I understand this is a discretionary call, and it is a discretionary call because the rule uses the word "may" as opposed to shall. The well known standard for evaluating the Court's discretion is that I have to recognize that I do have discretion. I have to recognize the parameters of that discretion, and I have to hopefully make a reasoned decision as to which way I go.

Tr. p. 791, LL. 18-25.

Contrary to St. Luke's assertions in its brief, the Court at no time during the proceedings below ruled that the encephalomalacia had not been properly disclosed. The issue, as recognized by the Trial Court, was really whether Dr. Wiggins' characterization of encephalomalacia, *after the initial objection,* may have added some unexpected dimension to the diagnosis with respect

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[3] In arguing that encephalomalacia should have been specifically disclosed by the Herretts through an expert (beyond the content of the medical record), St. Luke's asserts that:

> 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 witnesses about issues.***

App. Brief, pp. 17-18 (emphasis added). This argument underscores the frivolous nature of this issue on appeal. Without even addressing the differences between a paid expert and a treating physician that was working for the defendant, the suggestion that the *only* proof of a connection between the September hospitalization and the stroke is the encephalomalacia is absurd and amounts to cherry-picking the record. It also suggests that on cross-examination a party should be allowed to ask any questions it wants without fear of being corrected on redirect. It ignores the abundant facts already part of the record that supported the causal connection between the stroke and the hospitalization. It begs the question of whether the Herretts should have anticipated that St. Luke's would be so ignorant of the content of its own hospital records that a specific, separate reference to each and every medical iagnosis or "chief complaint" be disclosed through a treating physician beyond the records themselves. This argument is absurd.

to it being a "progressive type of stroke."

> The issue here is not, in my view, so much the testimony about the softening of the brain. I already ruled on that, and I said I thought that was fairly disclosed. I thought it was within the scope of the medical records. I thought that you -- and I agree with what [Mr. Whitehead is] saying -- is that that was certainly the tenor of the cross-examination to show that there was lots of reasons why Mrs. Herrett was having these problems in September and October beyond the stroke. I don't think there's any question about that. The problem that we really need to focus on is the question that led to Dr. Wiggins making the statement that it's a progressive type of stroke.

Tr. p. 785, LL. 9-22.

It is clear from the Court's discussion above that the only issue it thought needed addressed was something that Dr. Wiggins volunteered during her testimony. The Trial Court exercised its discretion in denying the motion for mistrial and allowed St. Luke's to discuss the encephalomalacia with its own expert on the witness stand and also gave an instruction to the jury.

d. St. Luke's misstates the Court's findings and cites to cases that are inapposite and bear no factual similarity to this case with respect to the admission of expert testimony

St. Luke's argument, at its heart, is that the Trial Court abused its discretion because I.R.C.P 26(b)(4)(A)(ii) required the Herretts to disclose that Dr. Wiggins would talk about encephalomalacia prior to trial, it was not contained in the written disclosure, and the Court allowed it anyway. To support this argument, St. Luke's draws upon cases such as *Edmunds v. Kraner*, 142 Idaho 867, 136 P.3d 338 (2006) and *Radmer v. Ford Motor Co.*, 120 Idaho 86, 813 P.2d 897 (1991). The problem with St. Luke's argument is the facts underlying these cases and the rationale asserted for reversing the lower court's discretionary decisions regarding paid expert testimony are completely inapposite to this case. St. Luke's argument also completely misstates the record in this case with respect to whether there was even a failure to disclose.

In *Edmunds*, the lower court struck plaintiffs' medical expert testimony and then granted summary judgment. 142 Idaho 867, 875, 136 P.3d 338, 346 (2006). The Supreme Court reversed the decision to strike expert testimony stating that, among other things, the Court "ignored that Idaho law and rules of civil procedure contemplate that expert opinions can change and develop during the course of litigation. ... Moreover, this decision was based on an incorrect understanding of discovery procedure." *Id.*

In *Radmer,* the trial court allowed an expert to testify, over objection, concerning a physical examination performed a few days before trial that was undisclosed and offered brand-new opinions concerning the cause of an accident that were contradictory to the opinions previously disclosed. 120 Idaho 86, 88, 813 P.2d 897, 899 (1991). Neither of those situations apply here. This is an undisputed liability case with significant damages. The specific diagnosis being complained about was scattered throughout the medical record and was being referenced by St. Luke's own treating physician. Contrary to the arguments from St. Luke's, the record is clear that the Trial Court understood the correct standard for considering a mistrial.

e. St. Luke's cannot claim surprise or prejudice because diagnosis of encephalomalacia and the fact that it was caused by the stroke is an undisputed medical fact

There is no dispute in this case that Mrs. Herrett was diagnosed by physicians working for St. Luke's as having encephalomalacia and that it was as a result of the stoke. The diagnosis appears all over the medical records used by both sides in this case. St. Luke's argument, *inter alia*, that it is the addition of the words 'continuing' or 'progressive' that somehow pushes Dr. Wiggins' redirect testimony into the objectionable realm falls flat for similar reasons. App. Brief, pp. 18-21.

Taken as a whole, Dr. Wiggins accurately described the diagnosis in the records. She testified that:

> Encephalomalacia's 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. 12-21. Dr. Wiggins also explained:

> 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.
> ***
> 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 that fits with the clinical picture that we saw, the deterioration.

Tr. p. 635, LL. 21 - 636, LL. 18 (emphasis added).

The CT report referenced in Exhibits K and L was also in the trial record prior to Dr. Wiggins' testimony on redirect. Exh. 5, SLMV5214-15. This report uses the same verbiage about 'progression' and 'changes' as Dr. Wiggins with respect to the encephalomalacia:

> ***Progression of encephalomalacia*** involving the left frontal and adjacent parietal region as seen on the CT of December 25, 2013 and MRI report of December 27, 2013.
> ***
> Impression: ***Encephalomalacia changes*** involving mostly the left frontal lobe region, correlating to the area of previous venous gas distribution and area venous infarct.

Ex. 5, SLMV5214 (emphasis added).

f. *St. Luke's cannot claim surprise or prejudice because it first introduced the evidence of the encephalomalacia to the jury through Defense Exhibits K and L during the cross-examination of Dr. Wiggins*

St. Luke's, in support of its cross examination, introduced and then referenced medical records in Defense Exhibits K and L. Tr. p. 621. From the very start of the cross examination, counsel for St. Luke's asked Dr. Wiggins about the records contained in the exhibits and whether she agrees with the assessments therein. *Id.* The approach was obviously intended to challenge

Dr. Wiggins' testimony elicited on direct.

The problem for St. Luke's with its cross-examination strategy is that its own records reflect that the "chief complaint" for the admission was "stroke." Exh. 5, p. SLMV5223. The portions of the records contained in Exhibits K and L are also replete with references to the encephalomalacia diagnosis. In fact, the encephalomalacia is a major component of Mrs. Herrett's treatment at St. Luke's during the September 2014 admission and mentioned in almost every hospital physician's note, including Dr. Wiggins'. Exh. 5, SLMV5214.

For example, St. Luke's Exhibit K, referenced in the portion of the transcript cited above, mentions the diagnosis in three separate inpatient progress notes by Dr. Timothy Enders. "The patient also has ***encephalomalacia*** in the left frontal lobe region as a result of her unfortunate air embolic stroke." Exh. K, p. 20 (emphasis added). "...[l]eft frontal ***encephalomalacia*** according to her most recent CT scan." *Id.* (emphasis added).

Unmentioned by St. Luke's in this appeal is that Dr. Ender's notes in Exhibit K also specifically discusses the encephalomalacia in relation to her stroke and the metabolic encephalopathy brought up by St. Luke's counsel on cross examination.[4] The note reads:

> ASSESSMENT AND PLAN
> 1. Metabolic encephalopathy. This is improved to grade 1. The patient is awake and alert to person, place and time; however, she is having some psychotic

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[4] In fact, the very first 'alternative diagnosis' raised in the cross exam is, according to the exhibit, related to the stroke as well:

> BY MS. FOUSER:
> Q. So if we start with K17, there's another doctor who was caring for her, Dr. Timothy Enders, correct?
> A. Yes, ma'am.
> Q. And if we look through his assessments when she was in the hospital, he thought she had metabolic -- one of the assessments was metabolic encephalopathy, correct?
> A. That's what he's saying.
> Q. Okay. And then -- so it was potentially multifactorial, correct?
> A. Yes, ma'am.
> Q. Okay. So there could be a lot of reasons that she's there, there could be several reasons that she's having the symptoms that she's having, fair?
> A. Yes, ma'am. (...)

Tr. p. 622, LL. 22 - p. 623, LL 10.

> features. ***This is likely related to her frontotemporal stroke....***
> ***
> 5. Cerebrovascular accident with residual right sided hemiparesis and spasticity. The patient has ***left frontal encephalomalacia*** according to her most recent CT scan. ***This encephalomalacia is likely the major contributor to #1.***

Exh. K, p. 22 (emphasis added).

> Dr. Ender's transfer summary, also part of Exhibit K, supports Dr. Wiggins and states:
>
> PROCEDURES: The patient has a CT of the head obtained on 09/14/14 ***showing encephalomalacia changes*** involving mostly the left frontal lobe region, correlating to the area of previous venous gas distribution and area of venous infarct. No associated new parenchymal hemorrhage. No new areas of encephalomalacia or edema. No hydrocephalus or midline shift.
> ***
> HOSPITAL COURSE: ... The patient was ***admitted as a result of mental status changes and weight loss***. ... Unfortunately, the patient has developed some paranoid type of delusions. There is concern ***that this correlates with the encephalomalacia located at the left frontal lobe region.***

Exh. K, p. 24 (emphasis added). The same is true for St. Luke's Exhibit L which contains physician evaluations by another St. Luke's physiatrist, Jonathan Myers. On the very first page it states:

> The head CT showed ***encephalomalacia of the left frontal lobe*** but no new hemorrhages and no new areas of edema or acute stroke. She was seen in consultation by Dr. Wiggins over the weekend, who felt that she warranted admission to acute inpatient rehabilitation.

Exh. L, p. 1 (emphasis added).

The encephalomalacia diagnosis is found again and again in separate notes by Dr. Myers contained in Exhibit L. Exh. L, p. 29, p. 38, p. 31. However, these portions of the exhibit and that diagnosis were not highlighted or asked about during the cross-examination of Dr. Wiggins. St. Luke's is presumed to know the content of its own records. It was not reasonably anticipated that St. Luke's would attempt to argue its defense by ignoring the "chief complaint" or significance of "encephalomalacia" in the medical records it was using as support. When they did, it is axiomatic

that Dr. Wiggins should be allowed to defend her answers on redirect and only fitting that she used information in St. Luke's own records to do it.

g. St. Luke's cannot claim unfair surprise or prejudice because it "opened the door" to this line of inquiry on cross-examination

Even assuming *arguendo* that encephalomalacia was not properly disclosed as part of Dr. Wiggins' testimony, the Court is not precluded from allowing a witness to comment on the records introduced by St. Luke's - as it did in this case. "Although the principal is not set forth in the rules of evidence, the proposition is generally accepted and frequently applied that a party cannot object to inadmissible matters where they are opened up by the objecting party. This principal is variously described as 'opening the door' or 'invited error.'" Lewis, Craig D., IDAHO TRIAL HANDBOOK, p. 294 (1995). "The 'invited error' doctrine also applies where otherwise objectionable matter surfaces in response to counsel's own questions, and to matters offered to rebut in areas first opened up by one's opponent." *Id.*

During its cross-examination of Dr. Wiggins, St. Luke's counsel asked about other medical conditions of Mrs. Herrett documented in her records without reference to the "chief complaint" or encephalomalacia. Tr. p. 598, LL. 22, p. 627, LL. 14.

"It is usually a basic function of redirect examination to allow a witness to explain his testimony elicited on cross-examination." *Sanville v. State*, 593 P.2d 1340, 1344 (Wyo. 1979), *citing State v. Price*, 513 S.W.2d 392 (Mo. 1974); *People v. Wesley*, 18 Ill.2d 138, 163 N.E.2d 500 (Ill. 1959); *State v. Lillian*, 180 Kan. 640, 305 P.2d 828 (Kan. 1957). "The opening of the door concept, however, reaches further and is an extension of that familiar rule. Succinctly stated, the "opening the door" rule is that a party who in some way permits the trial judge to let down the gates to a field of inquiry that is not competent but relevant cannot complain if his adversary is also allowed to avail himself of the opening within its scope." *Id.*, *Hobbs v. Ada County*, 93 Idaho 443, 462 P.2d 742 (1969); *U. S. v. Geller,* 481 F.2d 275, 276 (9th Cir. 1973).

Any claim of unfair surprise or prejudice rings hollow as it was St. Luke's that "opened the door" to this line of inquiry by its cross-examination of Dr. Wiggins.

h. Any error in admitting the testimony of Dr. Wiggins regarding encephalomalacia is harmless error

I.R.E. 103(a) provides that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." Similarly, I.R.C.P. 61 provides that "[t]he court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." This Court has repeatedly stated that "[i]ssues on appeal are not considered unless they are properly supported by both authority and argument." *H.F.L.P., LLC v. City of Twin Falls*, 157 Idaho 672, 686–87, 339 P.3d 557, 571–72 (2014), *citing Gem State Ins. Co. v. Hutchison,* 145 Idaho 10, 16, 175 P.3d 172, 178 (2007). "[A] party's failure to present some argument as to how the evidentiary ruling affected a substantial right is fatal to its evidentiary challenge and the Court deems the issue waived. *Id.*, *citing Hurtado v. Land O'Lakes, Inc.*, 153 Idaho 13, 18, 278 P.3d 415, 420 (2012). Because an appellant can only prevail if the claimed error affected a substantial right, the appellant must present some argument that a substantial right was implicated." *Id.*

Thus, "when appealing from an evidentiary ruling reviewed for abuse of discretion, the appellant must demonstrate *both* the trial court's abuse of discretion and that the error affected a substantial right." *Id.*, *citing Hurtado v. Land O'Lakes, Inc.,* 153 Idaho 13, 18, 278 P.3d 415, 420 (2012), *see also Goodspeed v. Shippen,* 154 Idaho 866, 870, 303 P.3d 225, 229 (2013)*; Akers v. D.L. White Const., Inc.,* 156 Idaho 37, 320 P.3d 428, 436 (2014).

The record is devoid of any evidence that the jury did not consider the correct measure of damages in this case. St. Luke's merely invites this Court to engage in alternative fact-finding

rather than offer any proof of prejudice.[5] The record below is replete with evidence that Mrs. Herrett was completely debilitated by her stroke and that it necessitated her return to the hospital in September 2014.

St. Luke's ignored that its own expert, Dr. Cox, testified that Mrs. Herrett suffered a terrible, catastrophic injury and would need in-home care for the rest of her life. Tr. p. 917, LL. 12-21. Dr. Cox opined that the stroke deprived Mrs. Herrett of five years of life. Tr. p. 1057, LL. 6 – p. 1058, LL. 8. St. Luke's has completely failed to demonstrate how the admission of Dr. Wiggins' testimony or the Court's refusal to grant a mistrial violated a substantial right. It points to no prejudice in admitting the testimony of Dr. Wiggins with respect to liability or the jury's finding of recklessness. St. Luke's fails to demonstrate any link between the presumably offensive testimony and the damages – economic or non-economic – in this case.

i. ***St. Lukes' has not correctly assigned error to the Trial Courts' evidentiary ruling admitting the encephalomalacia testimony by Dr. Wiggins and thus has waived that issue***

As part of its argument on the mistrial issue, St. Luke's argues that the Trial Court failed to apply the proper legal standards in admitting Dr. Wiggins' redirect testimony the Friday before. App. Brief, 16. The arguments purportedly address the mistrial issue, but misstate and then challenge the Court's prior evidentiary ruling. Idaho App. R. 35(a)(6) states "The argument shall contain the contentions of the appellant with respect to the issues presented on appeal, the reasons therefor, with citations to authorities, statutes and parts of the transcript and the record relied upon."

As a threshold issue then, the Trial Court's decision to allow that evidence into the record in the first instance was not raised as an issue on appeal and thus is waived. "Where an appellant

[5] It must also be noted that St. Luke's failed to file a post-trial motion asking the district court to rule that the non-economic awards were excessive. St. Luke's does not even attempt to argue excessiveness on appeal.

fails to assert his assignments of error with particularity and to support his position with sufficient authority, those assignments of error are too indefinite to be heard by the Court." *Bach v. Bagley*, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010), c*iting Randall v. Ganz,* 96 Idaho 785, 788, 537 P.2d 65, 68 (1975). "This Court will not search the record on appeal for error." *Id. Citing Suits v. Idaho Bd. of Prof'l Discipline,* 138 Idaho 397, 400, 64 P.3d 323, 326 (2003). Consequently, to the extent that an assignment of error is not argued and supported in compliance with the I.A.R., it is deemed to be waived. *Suitts v. Nix,* 141 Idaho 706, 708, 117 P.3d 120, 122 (2005).

C. Any unfair prejudice was cured by the the testimony of Dr. Cox regarding encephalomalacia and by the stipulated fact presented to the jury

1. St. Luke's was allowed to have Dr. Cox offer testimony about the encephalomalacia contained in the records, and he said the same thing as Dr. Wiggins

St. Luke's also argues that it could not cure any harm done by Dr. Wiggins' testimony, even though the Court allowed it to enquire of their own expert, Dr. Cox. Relying on the very same medical records as Dr. Wiggins, Dr. Cox said essentially the same thing when he described the encephalomalacia diagnosis as "the ***natural progression*** of what that brains looks like over time after someone has had a stroke" and "The encephalomalacia, ... is **progressing along just as we would expect.**" Tr. p. 903, LL. 12 - p. 904, LL. 4 (emphasis added).

2. St. Luke's waived any objection to the admission of Dr. Wiggins' testimony regarding encephalomalacia when it stipulated to the Trial Court instructing the jury that Mrs. Herrett did not have "continuing brain deterioration"

In order to make sure the jury was not mislead into thinking that the Herretts were claiming future damages as a result of continuing brain deterioration, St. Luke's stipulated that the Trial Court could instruct the jury as follows:

> I'm going to simply read this to you, but this is a piece of evidence, if you will. And it reads as follows: "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. 1133, LL. 21 – p. 1134, LL. 6.

Even assuming, *arguendo*, that allowing Dr. Wiggins' testimony regarding the encephalomalacia was error, such error was cured with that instruction to the jury. It essentially removed the issue from the jury's consideration. As this Court has stated, "We must keep in mind that error in the admission of evidence may be cured by proper instructions to the jury." *Barry v. Arrow Transp. Co.*, 83 Idaho 41, 47, 358 P.2d 1041, 1045 (1960), *citing Smith v. Hines*, 33 Idaho 582, 196 P. 1032 (1921); *Crossler v. Safeway Stores, Inc.*, 51 Idaho 413, 6 P.2d 151 (1931).

In the instant case, the Trial Court went out of its way to assuage St. Luke's argument that it was somehow unprepared to meet the encephalomalacia diagnosis as "ongoing" or "progressive" and St. Luke's has adduced no evidence that the judge abused his discretion in this regard or that the jury improperly considered any such evidence when it rendered its verdict.

St. Luke's argument on appeal completely glosses over the fact that the question of whether the stroke was 'progressive' or 'ongoing' was taken from the jury by stipulation. "Error in admission of evidence may be cured by proper instruction, and it must be presumed that the jury obeyed the trial court's direction." *Cook v. Skyline Corp.*, 135 Idaho 26, 32, 13 P.3d 857, 863 (2000), *quoting State v. Tolman*, 121 Idaho 899, 905–06 n.6, 828 P.2d 1304, 1310–11 n.6 (1992).

D. The Trial Court properly allowed Dr. Goldstien's rebuttal testimony because it had been properly disclosed with the appropriate foundation

1. The Trial Court has broad discretion and St. Luke's must demonstrate that a substantial right was affected by the admission of the evidence

"Error may not be predicated upon a ruling which admits or excludes evidence unless the ruling is a manifest abuse of the trial court's discretion and a substantial right of the party is

affected." *Ballard v. Kerr*, 160 Idaho 674, 693, 378 P.3d 464, 483 (2016). "Rebuttal evidence is evidence which explains, repels, counteracts, or disproves evidence which has been introduced by or on behalf of an adverse party." *State v. Sorrell*, 116 Idaho 966, 783 P.2d 305 (Ct. App. 1989), *citing State v. Olsen*, 103 Idaho 278, 647 P.2d 734 (1982). There is no doubt that the trial court has "broad discretion" in evidentiary decisions, including whether to admit evidence in rebuttal. This is true even where the evidence is not strictly rebuttal in nature, its admission is within the sound discretion of the trial court, provided that the party against whom the evidence is admitted had the opportunity to meet the evidence. *Id.*

The crux of St. Luke's argument is that Dr. Goldstein should not have been allowed to talk about a medical journal article presented in court by Dr. Shankland, St. Luke's nephrology expert. St. Luke's again argues that the Court abused its discretion but fails to argue exactly how – other than general reference to the discovery rules. It also fails to articulate how the admission of the testimony "prejudiced a substantial right." *Ballard*, 160 Idaho at 693, 378 P.3d at 483.

2. Dr. Goldstein's opinions that a reduced life expectancy could not be accurately determined simply based on Mrs. Herrett's preexisting kidney disease and the foundation for that was properly disclosed

Dr. Goldstein is a nephrologist who reviewed Mrs. Herrett's medical records and offered opinions in this case as to whether Mrs. Herrett's underlying kidney disease adversely impacted her life expectancy. He was disclosed both as part of the Herrett's initial expert disclosures and as a rebuttal witness. R. pp. 59-62; pp. 248-263; pp. 955-957. The substance of Dr. Goldstein's disclosures span 20 pages (both disclosures) and take into account voluminous medical records in addition to the other foundation including, but not limited to, his experience, training, and knowledge of nephrology. *Id.*

The error asserted by St. Luke's in this appeal is that Dr. Goldstein's opinions were not properly disclosed and the Trial Court erred in allowing him to testify on rebuttal. Dr.

Goldstein's opinions were outlined with the requisite specificity and with appropriate foundation based on the narrow issue he was expected to testify to - whether, to a reasonable degree of medical certainty, Mrs. Herrett's life expectancy was reduced due to her preexisting kidney disease. There is no dispute that he was disclosed as holding the opinion that "to a high degree of medical certainty ... Joyce Herrett's life expectancy as of December 25, 2013, (the day following her air embolism) is not shortened consequent to her known, established and stable mild to moderate chronic kidney disease." R. p. 253. In response to Dr. Goldstein's disclosures, St. Luke's disclosed Dr. Stuart Shankland. R. pp. 495-509. Dr. Shankland held opinions that there would be a reduction in life expectancy. His disclosure included a general reference listing 10 articles and chapters from various medical treatises and publications. R. p. 508. The Herretts then supplemented Dr. Goldstein's disclosure with specific references to issues raised by Dr. Shankland and their areas of disagreement. R. pp. 955-957. More than 11 specific opinions that addressed Dr. Shankland's disclosure were identified in the supplement which included references to Dr. Shankland's own materials. *Id.*

At trial, the Herretts elected not to call Dr. Goldstein in their case in chief. During St. Luke's case, it called Dr. Shankland to offer his opinion that Mrs. Herrett had a reduced life expectancy of 5-7 years. Tr. p. 978, LL. 23 – p. 999, LL. 25. Much of the opinions that had been disclosed, were not elicited. In support of his opinion, Dr. Shankland discussed one particular article at length with references to charts within the study. *Id.*

The Herretts called Dr. Goldstein to rebut Dr. Shankland's opinion regarding the reduced life expectancy. The argument on appeal is that Dr. Goldstein's disclosures did not rise to the level of specificity regarding his critique of Dr. Shankland's use of the article he discussed during his direct testimony.

3. The Trial Court correctly perceived the issue as one of discretion and exercised reason by hearing an offer of proof before allowing the testimony

The Trial Court was asked to rule on the admissibility of evidence throughout the trial. Both sides had objected to certain evidence being offered, including expert testimony for lack of disclosure. Addressing the latest objections raised on the issue with respect to Dr. Goldstein, the Court stated:

> With regard to number 7, which seems to be kind of the pivotal issue here, Dr. Shankland kept referencing an article that was -- I don't know even know what it was called. I think maybe he identified it, and I'm assuming that is the article that's going to be talked about on rebuttal. So obviously both parties know what that is. But I'm going to rule the same thing I kind of ruled the last time we had this issue. I can't rule on this motion until I hear the questions. So again, you need to be very specific with your questions, you need to be very specific with your objections. And instruct your witness, Mr. Whitehead, not to start volunteering information when there's an objection pending so I can rule on that.

Tr. p. 1087, LL. 20 - p. 1088, LL. 9.

The Court clearly understood the matter as one of discretion and thoughtfully considered the objection with regards to the circumstances he was confronted with. After an additional objection by St. Luke's, the Court took a recess to consider the issue again. Tr. p. 1093, LL. 24 – p. 1094, LL. 20. Upon returning to the courtroom, the Court made the following determination:

> The issue to the Court is not so much whether the opinion of Dr. Goldstein has been disclosed. I think it's very clear that his opinion is going to be that he disagrees with Dr. Shankland. Okay? The more precise issue is, why? And does that -- does this disclosure meet the facts and opinions as required by Rule 26? I don't know because I have no idea what he's going to say. So here's what we're going do. Mr. Whitehead, you make an offer of proof by examining him, I guess we're going to, like, testify twice today maybe, and then I can find out exactly what he's going to say, and I will tell you whether I agree or disagree that he's within the scope of the disclosure.

Tr. p. 1100, LL. 15 – p. 1101, LL. 1.

An offer of proof was then presented to the Court for his consideration and Dr. Goldstein was allowed to testify consistent therewith. Tr. p. 1113, LL. 21 - p. 1118, LL. 4. The Trial Court

correctly concluded that the testimony was in reference to the medical journal already presented by St. Luke's witness and that his opinions were consistent with his pretrial disclosures. Tr. p. 1110, LL. 16-23. The record demonstrates that Dr. Goldstein's opinions, and the basis therefore, were more than adequately disclosed prior to trial. The real crux of St. Luke's argument is that, despite only a general reference to the underlying articles and treatises in Dr. Shankland's disclosure, Dr. Goldstein should have provided specific, written criticisms of each and every article or treatise disclosed prior to Dr. Shankland even testifying. Just like the argument raised with respect to Dr. Wiggins' testimony on redirect, this argument presumes that Herretts' counsel or Dr. Goldstein could anticipate the level of detail Dr. Shankland would go into in his testimony with respect to the articles and treatises as support for his opinions. The logical extension of St. Luke's argument is that trial courts have no gatekeeper function or discretion with respect to the admission of evidence where I.R.C.P. 26(b)(4) applies and that trials are just scripted affairs when it comes to presenting experts.

4. Even assuming, *arguendo*, that admitting the rebuttal testimony by Dr. Goldstein was error, it was harmless given the undisputed causation and facts in this case regarding the catastrophic injuries suffered by Mrs. Herrett

The standard for harmless error and I.R.C.P. 61 has been previously discussed and is well known by this Court. The record clearly establishes that the Trial Court carefully considered the offer of proof prior to Dr. Goldstein's testimony and made a reasoned judgment to allow the limited rebuttal provided. St. Luke's generally ascribes error by asking this court to review that decision without pointing to any specific prejudice or harm. The disagreement between Dr. Shankland and Dr. Goldstein is not so wide as St. Luke's suggests and there is no evidence or argument that Dr. Goldstein's short rebuttal prejudiced St. Luke's or impacted the jury's verdict in any way. Even Dr. Shankland testified that no one can say when Mrs. Herrett will die, that good medical care would extend Mrs. Herrett's life expectancy, and that the article in question

was based on people who developed heart disease – something he acknowledged Mrs. Herrett had no clinical signs of. Tr. p. 985, LL. 24 – p. 986, LL. 102, Tr. p. 987, LL. 15-20, Tr. p. 998, LL. 21.

The argument asserted is one based on a perceived lack of technical compliance with I.R.C.P. 26(b)(4) rather than any surprise or lack of ability to meet the proffered testimony. St, Luke's failure to articulate the substantial right that has been affected or any prejudice with respect to the testimony at issue amounts to harmless error and/or waiver of that issue on appeal.

E. The reckless jury instruction was a correct statement of the law and appropriately given under the facts of this case

St. Luke's frames this issue purely as: "The Trial Court failed, as a matter of law, to properly instruct the jury on the correct legal definition of recklessness." App. Brief, pp. 34, 38.

1. The standard of review for this issue is *de novo* and, where the appropriateness of giving the instruction in the first instance is not at issue, the review is limited to whether the instructions, as a whole, correctly state the law

This Court exercises free review over the propriety of jury instructions. *Hennefer v. Blaine Cty. Sch. Dist.*, 158 Idaho 242, 253, 346 P.3d 259, 270 (2015), reh'g denied (Apr. 23, 2015), *citing Mackay v. Four Rivers Packing Co.,* 151 Idaho 388, 391, 257 P.3d 755, 758 (2011). "If the instructions as a whole, and not individually, fairly and adequately present the issues and state the applicable law then no reversible error is committed." *Clark v. Klein*, 137 Idaho 154, 159, 45 P.3d 810, 815 (2002), *citing Sherwood v. Carter,* 119 Idaho 246, 256, 805 P.2d 452, 462 (1991). "The burden is on the appellant to show prejudicial error from an erroneous jury instruction, and it must be clearly shown." *Clark,* 137 Idaho 154, 159, 45 P.3d 810, 815 (2002), *citing Burgess v. Salmon River Canal Co.,* 119 Idaho 299, 306, 805 P.2d 1223, 1230 (1991). "Reversible error only occurs when an instruction misleads the jury or prejudices a party." *Manning v. Twin Falls Clinic & Hosp., Inc.,* 122 Idaho 47, 51, 830 P.2d 1185, 1189 (1992),

citing Salinas v. Vierstra, 107 Idaho 984, 695 P.2d 369 (1985).

2. The district court's instruction on recklessness followed the standard set forth in the recent *Hennefer* decision and is a correct statement of the law

The jury instruction given at trial, 11.3, provided the following definition of recklessness:

> 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. The instruction given contains all of the elements of recklessness identified by this Court necessary to correctly state the law.

a. The correct standard for recklessness that applies under Idaho Code § 6-1603 is an objective, not subjective, standard.

In *Hennefer*, this Court articulated the correct standard for recklessness in cases applying I.C. §6-1603. 158 Idaho 242, 248–49, 346 P.3d 259, 265–66 (2015), reh'g denied (Apr. 23, 2015). An "objective" standard means that an actor "should have known" their conduct posed a high probability of harm. *Id.* The correct standard is:

> Though the actor must make a conscious choice as to his or her course of action, the actor need not subjectively be actually aware of the risk or the high probability that harm will result. ***It is sufficient for a finding of recklessness that the actor makes the choice as to his or her course of conduct under circumstances where the risk and high probability of harm are objectively foreseeable.***

Id. (emphasis added).

The language used in instruction 11.3 follows the standard set forth in *Hennefer* and incorporates the requirement that the actor needs to make a conscious choice: "Conduct is reckless when a person makes a conscious choice as to his or her course of action." R. p. 1177. It properly identified the objective standard: "under circumstances where the person knew or should have known...." *Id.* It properly linked the actor's choice with the high risk of harm: "that

such action created a high probability that harm would actually result." *Id.* The instruction also, consistent with *Hennefer*, instructed the jury that "[t]he term reckless does not require an intent to cause harm." *Id.*

The defendant in *Hennefer*, argued that "the correct standard involves an analysis of only the actor's subjective knowledge of a risk, subjective knowledge of the high probability that harm will result from that risk, and a conscious decision to proceed with the course of action despite that risk." 158 Idaho at 248, 346 P.3d at 265. In this appeal, St. Luke's similarly argues for a more subjective reckless standard with respect to 'intent.' It argues, "[t]he 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." App. Brief, p. 37. St. Luke's argues that instruction 11.3 "could clearly leave the jury with the impression that they need not judge the quality of risk assumed, and that the Herretts must simply prove that Nurse Wentz took this action after thinking about what should be done." App. Brief, pp. 36-37.

This argument, taken as a whole, is nonsensical and merely restates the idea that some kind of 'subjective' intent is required related to the "type" of harm suffered. There is no legal justification for that proposition. The objective standard articulated in *Hennefer* makes perfect sense because requiring actual intent to cause harm amounts to requiring the commission of a criminal act in order to find recklessness under I.C. §6-1603. Nothing in the statute, IDJI or the applicable case law imposes such a requirement.

3. The facts in this case overwhelmingly supported the jury's finding of recklessness and St. Luke's has failed to demonstrate any prejudicial error in giving the instruction, thus it was harmless

St. Luke's notes that their objection below was that "recklessness was not appropriate in this case." App. Brief, p. 34. The evidence in this case overwhelmingly supported the jury's conclusion that the hospital was reckless in causing Mrs. Herrett's stroke. Throughout its appeal,

St. Luke's attempts to downplay the seriousness of the stroke and repeatedly ignores the myriad evidence that was introduced in this case that supported a finding of reckless conduct by the jury.

The evidence at trial was that Nurse Wentz was unfamiliar and untrained in the procedure, that she failed to consult the policy prior to attempting the procedure, and that she asked another nurse for assistance without success. Tr. p. 439 – p. 440, LL. 21. Nurse Wentz testified that she knew a stroke could result. Tr. p. 447, LL. 19. Despite this, Nurse Wentz attempted the procedure anyway. Tr. p. 446, LL. 18. Nurse Sheila Dutt contradicted Nurse Wentz' testimony that Nurse Wentz had asked her for help or informed her that she had never removed a CVC before. Tr. p. 490, LL. 1-22. Like Wentz, she agreed that removal of a CVC is a "high risk" procedure with risks of stroke. Tr. pp. 487, LL. 8 – p. 488, LL. 21. She agreed that it would be "unthinkable" to ignore Wentz's request for help in removing the CVC. *Id.* Nurse Dutt's testimony clearly demonstrated that Nurse Wentz' conduct was not consistent with even minimum competency expected of a registered nurse. Tr. p. 489, LL. 9 - p. 490, LL. 23. Finally, there was uncontradicted testimony by the Herretts' expert nurse that the removal of the CVC in this case was "reckless." Tr. p. 517, LL. 5-16.

St. Luke's assignment of error with respect to the instruction cannot be supported because it cannot show any prejudice given the undisputed facts at trial, and thus giving the instruction was harmless.

4. St. Luke's misstates the Trial Court's legal analysis for giving the instruction

Even if it were relevant to this Court's inquiry, (it isn't), St. Luke's misstates the Trial Court's reasons for overruling the objection to the instruction 11.3. The Trial Court clearly understood the legal standard when it stated:

> The instructions from our supreme court to trial courts are that we should use ICJI[6] instructions unless there's a good reason otherwise. I think that's the general

[6] The transcript on appeal mistakenly references the "ICJI" rather than the "IDJI" discussed by the Trial Court and the parties below.

> standard. The Court is familiar with Hennefer, and there's no doubt in my mind that this language is taken out of Hennefer, the language in 11.3 is taken out of Hennefer. I think it's an appropriate statement of law. I'm going to deviate from the ICJI instruction. There's nothing wrong with the ICJI instruction, I just think Hennefer -- well, I think this instruction is better. I will add one sentence to it at the stout opposition of the plaintiffs, and that will be at the very end: "Reckless means more than ordinary negligence." I specifically took out the definition of negligence that was requested because I don't see that has anything to do with this case. It's been admitted. So that's why it does not appear in the instructions because we're not – I'll just leave it at that. But your objection for the record is noted. Do you have any other objections to the proposed instructions?

Tr. p. 1144, LL. 6-25.

5. Any error or defect in the instruction with respect to defining "negligence" was invited by St. Luke's because it stipulated to not giving the definition of negligence to the jury

Idaho law is well established that "one may not successfully complain of errors one has consented to or acquiesced in. In other words, invited errors are not reversible." *State v. Caudill,* 109 Idaho 222, 226, 706 P.2d 456, 460 (1985), *citing State v. Owsley*, 105 Idaho 836 (1983).

St. Luke's attempts to bolster its arguments with respect to instruction 11.3 by arguing that a jury question during deliberations "makes it apparent" that a "more accurate" definition was needed. App. Brief, p. 39. The problem with this argument is that St. Luke's agreed at the time not to give any additional instruction to the jury regarding the definition of negligence versus recklessness. Tr. p. 1233, LL. 23 - p. 1234, LL. 6. It had a chance to clear that up and didn't. If the crux of St. Luke's argument with respect to misleading this jury about the difference between recklessness and mere negligence is the jury was not told what mere negligence was, St. Luke's invited that error.

F. The district court did not abuse its discretion in determining the Herretts' life care expert had the proper foundation to testify

Prior to trial, the Herretts timely disclosed Debra DeMint-Lee, RN, CCM, CDMS as a life care planning expert. R. pp. 54-75. St. Luke's argues that Ms. DeMint-Lee lacked the appropriate

foundation to testify as to future medical costs of Mrs. Herrett. In making this argument, St. Luke's fails to specifically identify which opinions it finds objectionable. St. Luke's intentionally omits relevant facts and information about Ms. DeMint-Lee's expertise and foundation relied upon. St. Luke's further misstates and misconstrues the law regarding the necessary medical foundation for a life care planner.

1. Legal standard for expert testimony

In Idaho, the admission of expert testimony is governed by I.R.E. 701 and I.R.E. 702 which state, respectively:

> **Testimony by experts**:
> 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.
>
> **Basis of opinion testimony by experts**:
> 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. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

I.R.E. 702; I.R.E. 703.[7]

The standard of review for this evidentiary issue is known to this Court and discussed previously in this brief. St. Luke's has the burden of showing that the Trial Court abused its discretion in admitting Ms. DeMint-Lee's testimony. It falsely argues that the Trial Court failed to focus on "medical foundation" when it considered the evidence of Ms. DeMint-Lee's qualifications as an expert. In fact, the Trial Court demonstrably exercised its discretion when

[7] St. Luke's fails to cite to these Rules in connection with its argument concerning Ms. DeMint-Lee.

allowing the testimony in light of the foundation supplied (See #4, below) and its conclusions that the undisputed nature of the injuries coupled with Mr. Herrett's own observations would suffice. The Trial 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. This 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 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 the 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, LL. 16 – p. 815, LL. 5. This is consistent with applicable legal principles and demonstrates a reasoned decision in light of all of the evidence.

2. St. Luke's general objections on appeal constitute a waiver of this issue.

St. Luke's argues in this appeal that the Trial Court abused its discretion in finding that Ms. DeMint-Lee had the appropriate medical foundation to form the basis of her opinions.

Despite the extensive qualifications and substantial foundational evidence, St. Luke's makes only broad and vague objections to the testimony of Ms. DeMint-Lee. St. Luke's fails to adequately specify what specific opinion elicited at trial lacked foundation.[8] Ms. DeMint-Lee offered many opinions at trial. St. Luke's raised objections to some, but not others. In this appeal, St. Luke's does not state with particularity which opinions it contends were improperly admitted. The Herretts are thus "left to guess" as to the objection raised by St. Luke's. As a result of this defect, this Court should find that St. Luke's has simply waived any objection to the testimony or opinions of Ms. DeMint-Lee.

[8] For instance, St. Luke's failed to point to any medical procedure, service or device testified to by Ms. DeMint-Lee that could only be prescribed by a physician.

3. Ms. DeMint-Lee is more than qualified to present life care plans as an expert pursuant to Idaho Rule of Evidence 702

Ms. DeMint-Lee is a registered nurse (RN) licensed in Idaho, Oregon, Montana, and Arizona. Tr. p. 652, LL. 17-25. She also has a master's degree in vocational rehab counseling and a bachelor's degree in business management. Tr. p. 652, LL. 11-15. She is certified as a vocational rehabilitation counselor and carries credentials for case management certification. Tr. p. 652, LL. 6-20. Ms. DeMint-Lee has nearly thirty years of experience in the health care field. Tr. p. 653, LL. 10-13. She has completed more than fifty full life care plans and too many treatment plans to count. Tr. p. 654, LL. 18-22. Further, Ms. DeMint-Lee manages three clinics as a registered nurse, including the Veteran's Administration in Caldwell, Idaho. As part of her duties, she participates in patient care and rehabilitation of elderly patients. Tr. p. 652, LL. 2-10.

4. Ms. DeMint-Lee had the requisite foundation for her opinions pursuant to Idaho Rule of Evidence 703

In performing her duties as a life care planning expert, Ms. DeMint-Lee typically relies upon information gathered from medical records, information gathered from the patient, information gathered from medical professionals, as well as research into costing of services and items. Tr. p. 654, LL. 10-17. This is usual and customary in the industry for life care planners such as Ms. DeMint-Lee. Tr. p. 654.

In this case, Ms. DeMint-Lee gathered information directly from Mr. and Mrs. Herrett. Tr. p. 655, LL. 16-25. This included in person visits in their home as well as conversations on the telephone. *Id.* This allowed her to assess Mrs. Herrett's ability to function in the home and in society. Tr. p. 662, LL. 5-15. Based on her observations and interviews, Ms. DeMint-Lee testified as follows:

> So her physical impairments are pretty obvious. With her right arm, she has weakness, she has contractures of that hand at the elbow and wrist. She has an unsteady gait with mobility. She has – she's at risk for falls as a result of that. She

> has difficulty caring for, completing things like activities of daily living, showering independent, grooming independently, dressing. She can dress—she does as much for herself as she possibly can. She tries to dress the top of her body with short sleeve shirts, she's able to accomplish that. Pants are—she cannot do. Socks are very difficult with one hand, and it is her nondominant hand that she primarily has to use, but she uses—so that makes it difficult to do some of these tasks that she otherwise would.

Tr. p. 665, LL. 23 – p. 666, LL. 10.

Ms. DeMint-Lee also provided costing for medical services and medical devices. To obtain these costs, Ms. DeMint-Lee contacted providers who were located in Twin Falls, Idaho. Tr. p. 671, LL. 4-11; p. 680, LL. 21-25. As part of her foundation, Ms. DeMint-Lee reviewed the records of Mrs. Herrett's treating physician, Dr. Laucius. Tr. p. 709, LL. 15-23. She reviewed the records of Mrs. Herrett's treating nephrologist, Dr. Narasimhan. Tr. p. 710, LL. 15-25.

Ms. DeMint Lee also spoke to Dr. Calhoun, Mrs. Herrett's neuropsychologist, who determined that it is unsafe for Mrs. Herrett to be left home alone. Tr. p. 690, LL. 19-24. They discussed in-home care needs for Mrs. Herrett and what would be reasonable. Tr. p. 691, LL. 14-20. In addition to her own observations, Ms. DeMint-Lee based her recommendations for cognitive behavioral therapy and twenty-four hour in-home care on the recommendations of Dr. Calhoun. Tr. p. 679, LL. 21 – p. 680, LL. 11; p. 690, LL. 16 – p. 691, LL. 20.

Ms. DeMint-Lee consulted and had the life care plan approved by Ms. Deringer, a nurse practitioner. Tr. p. 669, LL. 9-18. Ms. Deringer[9] worked for the VA clinic managed by Ms. DeMint-Lee. Tr. p. 669, LL. 19-22. As a nurse practitioner, Ms. Deringer is able to independently assess, diagnose and treat patients. Tr. p. 670, LL. 9-11. Ms. Deringer prepared the treatment plan in concert with Ms. DeMint-Lee. Tr. p. 704, LL. 9-16. In doing so, Ms. Deringer reviewed the

[9] St. Luke's incorrectly argues that Ms. Deringer lacks foundation to opine as to the "costs" in this case because she lives in Arizona, not Idaho. App. Brief, p. 43. St. Luke's provides no authority for this position. Moreover, St. Luke's omits the fact that Ms. Deringer was providing foundation for appropriateness of care, not costs, and only moved to Arizona just prior to trial. Tr. p. 669, LL. 19 – p. 670, LL. 2. St. Luke's adduced no evidence that Ms. DeMint-Lee used costing figures from Arizona.

medical records, reviewed the treatment plan "line by line" and approved it.[10] Tr. p. 17-21. She provided recommendations, based on her expertise and the medical records, for occupational and physical therapies. Tr. p. 675, LL. 1 – p. 678, LL. 24.

With respect to the duration of the plan, Mrs. DeMint-Lee consulted standard life expectancy tables from the Centers for Disease Control and Statistics. Tr. p. 695, LL. 4-21. Again, St. Luke's own expert testified that using these tables is "standard in the industry." Tr. p. 1034, LL. 17-22. Ms. DeMint-Lee went further and consulted with a gynecologist, a nephrologist, and a nurse practitioner to address the effect of Mrs. Herrett's preexisting medical conditions on her life expectancy. *Id.* None of the medical professionals could say within a reasonable degree of certainty that there would be an adverse effect on her life expectancy. Tr. p. 695, LL. 22-25. Thus, ample foundation was provided regarding the duration of the plan.

Given the breadth of foundation provided at trial, St. Luke's simply cannot demonstrate that the Trial Court abused its discretion by finding that Ms. DeMint-Lee had adequate foundation for her opinions.

5. The cases cited by St. Luke's confirm that Ms. DeMint-Lee possessed adequate foundation for her opinions

The cases cited by St. Luke's are either factually distinguishable from this case, or are misapplied. For example, St. Luke's argues that *Hogland v. Town & Country Grocer of Fredicktown Mo., Inc.* 2015 U.S. Dist. LEXIS 80493 (E.D. Ark. 2015) supports its argument that Ms. DeMint-Lee lacked foundation for her treatment plan. In *Hogland*, the court specifically found that a neuropsychologist is qualified to render opinions regarding the need for in-home care and that such opinions can be the foundation for a life care plan. *Id.* at 64. In this case, it is undisputed that Ms. DeMint-Lee explicitly took into account the recommendation of twenty four

[10] The "rules of evidence explicitly permit experts to base their opinions on evidence that may not be admissible." *Hoffer v. Shappard*, 160 Idaho 868, 881, 380 P.3d 681, 694 (2016) (*citing* I.R.E. 703).

hour care from Mrs. Herrett's neuropsychologist Dr. Calhoun. Tr. p. 707, LL. 8 – p. 708, LL. 20. St. Luke's fails to point out these facts and conclusions from *Hogland* in an attempt to twist the holding in its favor.

St. Luke's cites *State Farm Mut. Auto. Ins. Co. v. Long*, 189 So.3d 335, 338-39 (Fla. Dist. Ct. App. 2016) for the proposition that "only a doctor can decide what future medical treatment is necessary." App. Brief, p. 44. The ruling in that case is not nearly as broad as St. Luke's asserts it to be. That case found only that a physician's assistant was not qualified to opine as to the need for a future surgery. *Long*, 189 So.3d at 338. Ms. Deringer is a nurse practitioner, who specializes in rehabilitation. There is no evidence that she recommended any future surgery. She did not recommend any future care outside of her expertise.[11]

Another case cited by St. Luke's confirms that a life care planning expert may establish foundation through physician reports, consultations, the life care planner's own findings, and the testimony of the injured party and their family. *Cooper v. Bouchard Transp.*, 140 So.3d 1, 7-10 (2013). That is entirely consistent with the foundation Mr. DeMint-Lee relied upon.

That case also cites to authority that life care planners can rely upon statements from the injured and their family, especially when the injuries are well documented and the need for future care is obvious. *Id.*, *citing Robin v. Allstate*, 889 So.2d 450 (2004). This is consistent with the findings and observations of the trial court in this case. Tr. p. 814, LL. 16 – p. 815, LL. 5.

With respect to the issue of lay testimony on causation, St. Luke's erroneously states that *Evans v. Twin Falls County* stands for the proposition that lay opinion is never inadmissible to prove medical causation. App. Brief, p. 45, *citing* 118 Idaho 210, 796 P.2d 87 (1990). This Court in *Evans* merely held that a lay witness could not testify to the cause of a heart attack that occurred eleven months after the complained of event. *Id.* Whether lay witness testimony is

[11] Again, St. Luke's fails to specifically articulate what portion of the plan they believe lacks adequate foundation.

admissible to prove causation is governed by I.R.E. 701 and 702. *Sheridan v. St. Luke's Regional Medical Center*, 135 Idaho 775, 785, 25 P.3d 88 (2001).

Foundation can be established in multiple ways, depending upon the case. Expert testimony is not even required in all cases. See *Id.* St. Luke's has failed to establish that the trial court abused its discretion in finding that Ms. DeMint-Lee established proper foundation.

6. The undisputed proof at trial was that Mrs. Herrett suffered a debilitating stroke that left her needing in-home care for the rest of her life and thus any error in admitting the testimony was harmless

As demonstrated throughout this brief, the important facts of this case are not largely in dispute. St. Luke's has admitted liability and a breach of the standard of care for its nurse causing Mrs. Herrett's stroke. There is undisputed evidence of reckless conduct. St. Luke's own witnesses said that Mrs. Herrett needs in-home care for at least 12 hours a day. Tr. 893, LL. 19-25 – p. 894, LL. 1-14. The costing by Ms. Dunlap in that regard was substantially similar to Ms. DeMint-Lee's.

In arguing that Ms. DeMint-Lee did not have proper foundation for her testimony, St. Luke's fails to argue how the admission of this evidence affected a substantial right where the undisputed evidence supports the jury's award, and thus any error was harmless.

7. St. Luke's request for remittitur is waived

For the first time on appeal, St. Luke's requests a remittitur. App. Brief, p. 45. St. Luke's failed to request a remitter of the future medical care costs pursuant to I.R.C.P. 59.1 at the district court level. The issue of remittitur was waived as it is presented for the first time on appeal. *See Kinsela v. State Dep't of Finance*, 117 Idaho 632, 634, 790 P.2d 1388, 1390 (1990).

G. This Court should award attorney's fees and costs pursuant to § 12-121 as this appeal is frivolous, unreasonable and without foundation

Idaho Code § 12-121 permits this Court to award "reasonable attorney's fees to the

prevailing party." The Court will award fees if it determines "the action was brought or pursued frivolously, unreasonably, or without foundation." *Ballard v. Kerr*, 160 Idaho 674, 720, 378 P.3d 464, 510 (2016); *Turner v. Turner*, 155 Idaho 819, 827, 317 P.3d 716, 724 (2013); *Baker v. Sullivan*, 132 Idaho 746, 751, 979 P.2d 619, 624 (1999). When an appellant fails to present a cogent argument as to why he should prevail, an award to his opponent is appropriate. *Turner*, 155 Idaho at 827, 317 P.3d at 724; *Chicoine v. Bignall*, 127 Idaho 225, 228, 899 P.2d 438, 441 (1995).

This Court has repeatedly stated "[w]here issues of discretion are involved, an award of attorney fees is proper if the appellant fails to make a cogent challenge to the judge's exercise of discretion." *J-U-B Engineers, Inc. v. Sec. Ins. Co. of Hartford*, 146 Idaho 311, 318, 193 P.3d 858, 865 (2008); *Utter v. Gibbins,* 137 Idaho 361, 367, 48 P.3d 1250, 1256 (2002), *quoting Andrews v. Idaho Forest Indus., Inc.,* 117 Idaho 195, 197, 786 P.2d 586, 589 (Ct.App.1990). Likewise, an award of attorney fees under this statute is appropriate if the appeal simply invites this Court "to second-guess the trial court on conflicting evidence." *Turner*, 155 Idaho at 827, 317 P.3d at 724; *Hogg v. Wolske*, 142 Idaho 549, 559, 130 P.3d 1087, 1097 (2006).

St. Luke's has demonstrably failed to raise a proper issue on appeal. It simply asks this court to substitute its discretion for that of the Trial Court and jury. It fails to link up any of the purported errors complained of with a violation of a substantial right or prejudice. It consistently misstates the applicable law, the Trial Court's findings below, and the evidence presented at trial that contradicts its tainted view of the harm it did to Mrs. Herrett. The arguments raised by St. Luke's cherry-picks references to the record and ignores their own experts and witnesses with respect to the issues raised. The evidentiary rulings and the denial of the motion for mistrial were matters determined in the exercise of discretion by the Trial Court. The instruction given was not clearly erroneous and correctly applied the objective standard for recklessness and St. Luke's

invited the error complained of. This is a frivolous appeal, and the Herretts are entitled to attorney's fees.

IV. CONCLUSION

The Herretts respectfully ask that this Court affirm the judgment entered in this case and award attorney's fees and costs in defending this appeal.

DATED this 16th day of May, 2017.

PEDERSEN and WHITEHEAD

By _____
Jarom A. Whitehead, ISB #6656
Attorney for Plaintiffs/Respondents

CERTIFICATE OF SERVICE

Jarom A. Whitehead, a resident attorney, hereby certifies that on the 16th day of May, 2017, he caused two true and correct copies of the within and foregoing RESPONDENTS' BRIEF to be forwarded with all required charges prepaid, by the method(s) indicated below, to the following:

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